

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,

IN THE
EASTERN DISTRICT, AT NEW ORLEANS,
FROM THE 20TH MAY TO THE 12TH JULY, 1844.

PRESENT:

HON. HENRY ADAMS BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

PIERRE A. ST. MARTIN *v.* HIS CREDITORS.

The mere incompetency of a person to testify as a witness in a cause, will not authorize a court to exclude from its consideration the legal inferences which might otherwise be drawn from acts done by him, at a time when it is impossible to suppose that any of the parties were manufacturing evidence for the cause.

APPEAL from the District Court of the First District, *Buchanan, J.*

S. L. Johnson, for the appellants. The case was submitted, without argument on behalf of the appellee.

MORPHY, J. Six of the minor children of the late Pierre Bauchet St. Martin, jr., made opposition to the tableau of distribution filed in this case, claiming to be placed thereon as mortgage creditors for the sum of \$2540. This sum, they allege, accrued to them from the succession of their grandfather, and was

received in June, 1834, by their late mother and tutrix, whose estate having been accepted purely and simply by the insolvent, their brother, passed into his hands, subject to their legal mortgage. The statement of facts shows, that Pierre Bauchet St. Martin, sen., grandfather of the opponents as well as of the insolvent, died in 1831, leaving descendants, all grand-children, fourteen in number; ten of them descended from him through his son, Pierre Bauchet St. Martin, jr., and four through his daughter, who had married Dr. Ives Lemonier; that the property of the deceased yielded upwards of fifty thousand dollars; that no final settlement or partition of the estate has yet been made, but as there were debts to a considerable amount, it is admitted that a sum considerably less than that claimed by the opponents, accrues to each heir; that notes to the amount of \$17,706 84 proceeding from the sale, came into the hands of Moreau Lislet, who was the attorney of the heirs; that he delivered these notes to Dr. Ives Lemonier, the father and tutor of four of the heirs; that of the ten children of Pierre Bauchet St. Martin, jr., only the insolvent and his brother, F. B. St. Martin, were of age; that the other eight were represented by their mother and natural tutrix, until the year 1833, when she died; that two of her children, Genevieve and Héloïse, died shortly after her, and the six remaining are the opponents in this case; that when Pierre Bauchet St. Martin, jr., died, in 1830, the community property was adjudicated to his widow, at its appraised value in the inventory; and at her death, in 1833, the insolvent and his brother, F. Bauchet St. Martin, who has also failed since, accepted her succession purely and simply; that on the 16th of June, 1832, the insolvent gave a written authorization to Moreau Lislet, to receive from René Lemonier, the executor of his brother, Ives Lemonier, \$2540, on account of the sum of \$17,706 84 in notes, which had been deposited with the deceased, and belonged equally to all the grand-children of the late Pierre Bauchet St. Martin, sen.; in which order Moreau Lislet was requested, as soon as he received this sum, to pay and take up a draft of a like amount, drawn by P. A. St. Martin, the insolvent, on Byrne, Ryon & Co., to the order of F. A. Blanc, payable on the 13th of June, 1832; that P. A. St. Martin, who was their brother, was in all this acting as the agent of their mother

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and tutrix, for whose benefit and accommodation this draft was drawn and afterwards paid; that she thus received this amount which was coming to them from the succession of their grandfather, and that therefore, they are entitled to be paid the amount with legal interest, out of the proceeds of the property derived by the insolvent by inheritance from their mother. The judge below dismissed their opposition, being of opinion that the evidence adduced was not sufficient to support it, and they have appealed.

Charles Byrne and Theodore Ryon, of the firm of Byrne, Ryon & Co., testified that they had been the factors of the widow St. Martin, the mother of the opponents, but transacted all her business through her son, P. A. St. Martin, with whom they always treated as her agent; that on the 20th of March, 1832, they accepted the draft of \$2540, drawn on them by P. A. St. Martin, and charged it in their bill-book to his mother, the widow St. Martin, as being the person for whose accommodation the acceptance was made; that in 1833 they rendered to her an account, in which they charged her a commission for accepting this draft which they paid at maturity, but of which, the amount was reimbursed to them by Moreau Lislet, the same day, or the day after it had been paid; that all the items for supplies set forth in their account were charged to the widow St. Martin, for the use of a plantation she owned, and that all the notes and drafts therein mentioned were for her account, although signed by her son, P. A. St. Martin, in his own name, and that he paid them the balance stated in the account as due by his mother; that at the time of the acceptance of this draft, and up to the death of the widow St. Martin, there was no account opened with the insolvent, who, they believe, was living with his mother on her plantation; that they never had any communication with her except through her eldest son, the insolvent, who was in the habit of transacting all her business with their firm.

This evidence sufficiently shows, we think, that this draft of \$2540 was for the account and accommodation of the widow St. Martin, and that the money which Moreau Lislet applied to its payment was in fact received by her. We must come to this conclusion, unless we suppose a long continued and concealed fraud practiced by the insolvent upon his mother, a supposition

which nothing in the record is calculated to sanction. The district judge thought, that as the insolvent could not be sworn as a witness in this case, his acts, although done long previous to his insolvency, were not to have any weight or bearing, nor to authorize the legal inferences that such acts would otherwise warrant. Admitting that the insolvent would not have been a good witness to prove that this money was received by his mother for the account of the opponents, although this is by no means clear, as he would be testifying against his own interest, his acts which are relied on to show this fact, should have their due weight, as they took place at a time when it is impossible to suppose that any of the parties were manufacturing evidence for this case. But the record exhibits another corroborating circumstance, which renders it altogether improbable that René Lemonier would have advanced to P. A. St. Martin, for his own account, \$2540, out of the funds of the estate of his grandfather. It is shown that, at the probate sale of the succession, the insolvent, and his brother F. B. St. Martin, who were the only heirs then of age, bought property to an amount much larger than their probable portion as heirs of their grandfather, which, it is admitted, will fall much short of the amount claimed. This circumstance is conclusive to our minds, that P. A. St. Martin would not have asked, much less René Lemonier have paid, this amount of \$2540, on the order of the insolvent, had it not been well understood that it was for the use and benefit of the mother and tutrix of the minors St. Martin, who had as yet received no portion of their grandfather's estate. The claim of the opponents should, we think, be allowed, after deducting from it the sum coming to each of the insolvents, P. A. St. Martin and F. Bauchet St. Martin, as heirs of their deceased sisters, Héloïse and Genevieve.

It is therefore ordered, that the judgment of the District Court be reversed; and proceeding to give such judgment, as in our opinion should have been rendered below, it is ordered that the tableau of distribution be amended, and the opponents placed thereon as mortgage creditors for \$2381 25, with legal interest from the 18th of June, 1832, on the property formerly belonging to their tutrix and surrendered by the insolvent; the costs to be

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borne by the estate; and the tableau so amended to be finally homologated.

THE PRESIDENT AND COUNCIL OF THE CITY OF LAFAYETTE
v. THE PARISH JUDGE OF JEFFERSON.

No appeal will lie to the Supreme Court from an order of a District Court, directing a mandamus to a parish judge commanding him to allow an appeal to the District Court from a judgment rendered by him on an opposition made under the stat. of 26 March, 1842, relative to lands divided into town lots. Such an order is not a final judgment in any case pending before the District Court C. P. 566, 839. *Aliter*, had the mandamus been refused.

APPEAL from the District Court of the First District, *Buchanan, J.*

Wills, for the plaintiffs.

Remy, for the appellant, Buisson.

MORPHY, J. This is an appeal from an order of the District Court, directing a peremptory mandamus to be issued to the parish judge of the parish of Jefferson, commanding him to allow an appeal to that court from a judgment by him rendered, on an opposition made by the President and Board of Council of the city of Lafayette to the approval of a corrected plan of the suburb Livaudais, filed in his office by Benjamin Buisson, state surveyor for the parish of Jefferson, pursuant to the law of the 26th of March, 1842, relative to lands divided into town lots. We have found it unnecessary to examine the grounds upon which the district judge based the order complained of, as we are of opinion that no appeal to this court lies from such an order. It is not a final judgment rendered in any case pending before the District Court. The order is one made by that tribunal in aid of its appellate jurisdiction over an inferior court, with which it is not our province to interfere, especially as it works no irreparable injury to the appellant. Code of Practice, arts. 566, 839. If the application for a mandamus had been refused by the District Court, we might perhaps have felt it our duty to entertain an

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appeal from the decision, as it might have unlawfully deprived the applicants of their constitutional right of bringing their case ultimately before this tribunal, in a controversy the amount of which exceeds three hundred dollars.

Appeal dismissed.

JOHN H. MARTINSTEIN v. HIS CREDITORS.

The books of a merchant cannot be given in evidence in his favor; but if introduced by the other party, the whole must be taken together. C. C. 2244.

To ascertain the amount due on a debt bearing interest on which partial payments have been made, interest should be calculated from the maturity of the debt till the day of a partial payment. If the payment exceed the interest then due, it should be applied first to the payment of the interest, and the residue to the extinguishment of the principal; interest to be calculated on the balance due up to the next partial payment, and so on. Should any partial payment be less than the amount of interest at the time, it must be imputed, so far as it will go, to the extinguishment of interest. C. C. 2160.

APPEAL from the District Court of the First District, *Buchanan, J.*

Canon and Roselius, for the appellant, Martinstein.

Preston, for the representatives of Aikin.

Lockett, for the syndic.

SIMON, J. The matters in controversy grow out of the tableau of distribution filed by the syndic of the estate of John H. Martinstein, who, far from being insolvent, appears by the said tableau to be entitled to a large balance proceeding from the sales of the property by him surrendered to his creditors.

Opposition was made by the petitioner to the homologation of the said tableau on divers grounds, among which he complains, that the amount therein stated to have been paid by the syndic to Oliver Aikin or his succession, is not wholly due by the opponent, who acknowledges himself indebted to Aikin only in about the sum of \$12,000. He also alleges that in his account filed there are sums for illegal interest, for commissions, &c., which are not due by the opponent; and that the sum of \$3845, stated

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in the tableau to be the balance of accounts claimed by Aikin, or his representatives, is not due by the opponent.

Aikin's representatives also filed an opposition to the tableau, based upon an account annexed thereto, in which they claim as due to them on the first of February, 1837, a balance of \$9311 84, which they pray may be allowed, with ten per cent interest from that date until paid.

The respective pretensions of the opponents were fully and minutely investigated by the judge *a quo*, from the vouchers and documents produced, and from the books kept by Aikin, the same having been called for by Martinstein. Written instructions or directions were given by the judge to serve as the basis of the account to be established and liquidated between the parties, whereupon said parties respectively made a statement of the amount which they conceived to be due to Aikin's representatives. The account presented by Aikin's representatives shows a balance due them of \$6358 48, and the account presented by Martinstein exhibits a balance due by him, of only \$2335 99, making a difference to be decided upon by the court of \$4022 49, which became the subject of a new investigation.

The judge *a quo* proceeded to liquidate the balance due by Martinstein to Aikin, and found that the latter was entitled to recover the sum of \$6000, for which he rendered judgment in favor of Aikin's representatives, to be paid out of the funds in the hands of the syndic; and from this judgment Martinstein has appealed.

This case presents no question of law. It involves merely questions of account which, as we have already remarked, were fully investigated by the inferior judge, and appear to have been settled below from the facts disclosed by the various transactions had between the parties during a certain number of years, and from the friendly intercourse which appears to have existed between Martinstein and Aikin, the latter of whom used to endorse for Martinstein, and to aid him in raising money, &c. There was a written agreement signed by them on the 25th of April, 1834, in which, after mentioning that a certain number of notes were deposited by Martinstein in the hands of Aikin, as collateral security for the payment of four notes due by Martinstein, amount

ing to \$17,000, endorsed by Aikin, and due and protested on the 23d of the same month, it is expressly stated, that certain property sold by Martinstein to Aikin, is to be reconveyed to him after payment of the amount due Aikin, &c.; that the surplus of the proceeds of the sale of other property mortgaged shall be accounted for &c.; and that certain notes received by Aikin from Roswell Beebe, and shaved for the purpose of paying Martinstein's notes, are considered as having been discounted at the expense of said Martinstein.

We have read attentively the directions given by the judge *a quo*, on which Aikin's account was based, and are convinced of their correctness. Those directions were also taken by the judge as the foundation of his final judgment upon the respective rights of the parties; which judgment divides the difference between their respective accounts into seven items, a careful review of which has brought us to the conclusion that no error has been committed.

1st. The sum of \$853 is allowed as being the amount of the the shaving interest to be supported by Martinstein. It is clear that this charge is to be borne by him, under the written agreement above referred to.

2d. This is for costs paid in a suit against Martinstein, and was properly allowed.

3d. This is for a sum of \$1100, charged as cash to Martinstein. It appears that this charge was proved by the books of Aikin, called for by Martinstein, and produced in evidence. Martinstein had the benefit of two credits found in the books, and it is clear that, although the books of merchants cannot be given in evidence in their favor, still, when called for by the other party, they must be taken together; and they cannot be rejected, when they contain facts against the party at whose request they are produced. Civil Code, art. 2244. Code of Practice, arts. 140, 473.

4th. This item of \$202 50, was properly rejected, as being already included in another charge.

5th. This charge is for one of Commagère's notes which was lost or mislaid, and never was recovered by Aikin. The remark of the judge that the loss of this note cannot materially in-

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terfere with its recovery from Commagère's estate, appears to us correct.

6th. This is the amount of interest due on the above sums, and must necessarily be allowed.

7th. This appears to be the difference of interest, resulting from the manner in which it was calculated and stated in the account. This difference amounts to \$1098 73. On referring to Aikin's account, we think it was properly calculated. The calculation appears to have been made according to the rule recognized by this court in the case of *Hynson et al. v. Maddens et al.*, 1 Mart. N. S. 571, in which it was held that, when partial payments are made, interest should be calculated from the maturity of the debt, till the day of a partial payment and added to the principal, and then the partial payment be deducted from the aggregate, the balance to continue to bear interest until the next partial payment, and so on, unless the payment made is not sufficient to extinguish the interest due at the time it is made. Under art. 2160 of the Civil Code, the partial payment must first be imputed to the extinguishment of the interest. The account of Martinstein is, in our opinion, incorrect. It takes the 1st of July, 1837, as the date until which the interest is to be calculated; but it charges Aikin with interest on the notes by him received and collected, not from the time they became due, but from the 23d of April, 1834, the day on which they were deposited by Martinstein in Aikin's hands under the written agreement.

Upon the whole we have been unable to discover that any part of the judgment appealed from requires our interference.

Judgment affirmed.

BERTRAND SALOY v. CHARLES YTASSE and another.

No appeal will lie where the amount in controversy is less than three hundred dollars.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Beauregard and Buisson*, for the plaintiff.

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Florance v. Greene.

J. F. Pepin, for the appellants.

MORPHY, J. This suit is brought to recover the sum of \$213, alleged to be secured by a privilege on a certain house and lot, for materials furnished to the principal defendant for the erection of the said house. It is further stated in the petition, that the property upon which the plaintiff seeks to exercise his privilege, was subsequently sold by his debtor to the other defendant, but that the sale was passed with the view to deprive the plaintiff of his said privilege.

The defendants joined issue by pleading a general denial, and by pleading a reconventional demand of \$200, based upon the suits having been brought on false allegations, and causing useless expense to the said defendants, &c.

The parish judge recognized the plaintiff's privilege on the property described in his petition, and gave judgment in his favor accordingly, for the amount by him claimed; and from this judgment, the third possessor of the property took this appeal.

It is clear that the amount in controversy being less than \$300, this suit is not within the limits of our appellate jurisdiction.

Appeal dismissed.

WILLIAM FLORANCE v. JOHN GREENE.

Art. 3124 of the Civil Code determined the rights of a pledgee in relation to the other creditors of the pledgor. The rights of the pledgor against the pledgee are regulated by art. 3132.

Under art. 3132 of the Civil Code, the pledgor is entitled to chose whether the thing pledged shall be retained by the pledgee at its appraised value, or be sold at public auction, only when the pledgee does not insist upon its being sold to obtain payment out of the price, but signifies his wish, with the consent of the pledgor, to have it adjudicated to himself at its appraised value.

APPEAL from the District Court of the First District, *Buchanan, J.*

Josephs, for the plaintiff.

F. B. Conrad, and *Roselius*, for the appellant.

BULLARD, J. The defendant has appealed from a judgment, by which the plaintiff recovered a sum of money loaned to him on pledge, and has been decreed to have a privilege on the things put in pledge, to wit, a series of notes, secured by mortgage. The petition concluded with a prayer, that the notes pledged might be ordered to be sold to satisfy the judgment.

The defendant did not deny either the loan or the pledge; but he avers, that the pledge given to the plaintiff, embraces a much larger amount of property than necessary to pay the plaintiff's claim, and he prays the court, in the event of a judgment being rendered against him, to be allowed to avail himself of the privilege accorded to him by law, of having so much of the pledged property as will satisfy the plaintiff's demand appraised, to be taken by the plaintiff in payment of said judgment.

After this answer was filed, the plaintiff's counsel, on his motion, obtained leave to discontinue so much of the prayer of his petition, as asked for the sale of the notes pledged, in execution of the judgment.

Judgment was rendered for the amount, and the plaintiff's privilege upon the things in pledge was recognized.

The pretensions of the appellant are grounded upon article 3132 of the Civil Code, which declares that, "the creditor cannot, in case of failure of payment, dispose of the pledge, but may apply to the judge to order that the thing shall remain to him in payment for as much as it shall be estimated by two appraisers, or shall be sold, at public auction, *at the choice of the debtor*. Any clause which should authorize the creditor to appropriate the pledge to himself, or to dispose of the same, without the aforesaid formalities, shall be null."

The Code of 1808, did not contain the clause giving to the pledgor the option to have the thing sold, or taken by the pledgee at an appraisalment. The clause was introduced by the juriconsults who were employed to prepare amendments to that Code; nor is that provision to be found in the Code Napoléon, from which the article, with that exception, is literally copied.

It is urged by the plaintiff's counsel, that the contract of pledge is an accessory one for the benefit of the creditor, to whom it

affords a security; that he may forbear to resort thereto, and stand upon his contract of loan; and that he is not bound to present any alternative to the pledgor, but may at once demand a sale: and he invokes article 3124, which declares, that "the pawn invests the creditor with the right of causing his debt to be satisfied by privilege and in preference to the other creditors of his debtor, out of the product of the moveable, corporeal or incorporeal, which has thus been burdened."

We are of opinion that this last article regulates the rights of the pledgee, in relation to the co-creditors of the pledgor; and that his rights against the latter are to be exercised under the article first cited. At the same time we do not doubt his right to waive his security.

The main purpose of the legislature appears to have been, to prevent the pledgee from making the pledge his, on the failure of the debtor to pay. Even a stipulation to that effect is prohibited, and declared null and void. The law does not even leave to him the option to have the thing adjudged to himself, at an appraisalment, or sold. He may demand either, in the alternative; and, in the event of his making such a demand, the option is left to the pledgor, because as soon as the creditor signifies his willingness to take something else besides gold and silver in discharge of the debt, he has no longer a right to complain, that he is compelled to do so by the choice of the debtor, who in his turn may forbear the advantage, which the law affords to him, of having the thing sold, in order that he may receive the surplus over and above the amount of the debt.

We conclude, for these reasons, that the legislature intended to give the choice to the debtor, in those cases only in which the creditor does not insist upon the property pledged being sold in order to be paid out of the proceeds, but signifies his wish that, with the consent of the debtor, it may be adjudicated to him at its appraised value, as it would be his interest that it should be, in case there was no hope that the property might sell for a sufficient sum to pay the debt, and the debtor was without the means of paying the deficiency.

In the present case the court was authorized to pronounce the judgment it did. Not only in the original petition the plaintiff

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did not ask that the pledge should be adjudged to him, but by an amendment afterwards, which the court did not err in permitting, he discontinued his demand to have the property sold in execution of the judgment: and, the judgment merely recognizes the existence of the pledge and of the plaintiff's privilege.

Judgment affirmed.

THOMAS O. MARR v. THEOPHILUS R. HYDE and another.

Where a party is bound to furnish an account, his adversary may use that part of it which is against him, without being compelled to admit the items in it which are in his favor.

Where there is no stipulation for the payment of interest, it is due from the time of putting the debtor in default for the payment of the principal. C. C. 1932.

An agent is responsible for interest on any sum of money employed for his own use, from the time of so employing it. C. C. 2934.

APPEAL from the Commercial Court of New Orleans. *Watts, J.*

Peyton, and I. W. Smith, for the plaintiff.

Lockett, and Micou, for the appellants.

MORPHY, J. This suit is brought to recover \$493 57, with legal interest from the 17th of June, 1839, on which day, it is alleged, that the defendants received this sum as agents for the plaintiff, who had theretofore deposited with them for collection a note of \$430, of one J. C. Drew, which, together with the interest thereon to that time, amounted to the sum paid. It is further alleged, that the defendants have appropriated this money to their own use, and have ever since refused to pay it, although amicably requested to do so. Annexed to the petition is an account current signed by the defendants, which states that they owed this amount, but sets forth various charges which reduce the sum due to the plaintiff to \$268 44. These charges the petitioner avers, are unfounded and illegal. He had a judgment below, from which the defendants have appealed.

No proof was offered on the trial in support of the charges objected to in the account of the defendants; but in this court

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they have contended that, if the account annexed to the petition is relied on by the plaintiff, the whole account must be taken together, that it cannot be divided, and that the balance which it exhibits should alone be considered as due. It is now well settled, that where a party is bound to furnish an account, his adversary may use that part of it which is against him, without being compelled to admit the items in it that are in his favor. 1 La. 232. 5 Mart. N. S. 319. Were it otherwise, the principal, who, in many cases, has no means of knowing how his affairs have been conducted, except through the account which his agent is bound to give him, would be completely at the mercy of the latter. In this case the petitioner does not rely exclusively on the account rendered to him by the defendants. He has proved by the maker of the note of \$430, the payment of its amount into the hands of the defendants, about the time stated in the account. There is error, however, we think, in that part of the judgment appealed from, which allows interest from the 17th of June, 1839. It is not shown that the defendants appropriated this money to their own use, or that any call or demand was made on them to pay it before the institution of the present suit. This was on the 3d of May, 1843; and from that time only they have been in delay, and are bound to pay interest. Civil Code, arts. 1932, 2984. 19 La. 437.

It is, therefore, ordered, that the judgment of the Commercial Court be so amended as to bear interest only from judicial demand, and that it be affirmed in all other respects; the plaintiff and appellee to pay the costs of this appeal.

ADELAIDE BROWN v. HENRIETTE COUGOT and another.

A promise by a legatee to pay to a third person, on the settlement of a succession, a certain per centage on the amount of a legacy, does not authorize the latter to oppose the seizure and sale of the legacy under a *fi. fa.* taken out by a creditor of the former, on the ground that the seizure is more than sufficient to satisfy the claim, and that the sale of the legacy may cause irreparable injury to the opponent. The right of third persons to oppose an execution, is confined to those cases in

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which the opponent is the owner of the thing seized, or has a privilege on it. C. P. 395, 396.

The right given to a debtor to have a seizure reduced to an amount sufficient to satisfy the judgment and costs, is reserved to him alone. If he do not complain that too much has been seized, no other party can make the objection.

A legacy, being indivisible as between the debtor and creditor, without the consent of both, a portion of it only cannot be seized and sold under execution. *Per Curiam*: The executors of the estate cannot, without their consent, be compelled to pay the legacy to a number of transferees, whether by voluntary assignment, or by legal transfers resulting from sales under execution.

The stat. of 25 March, 1831, s. 3, extended by stat. of 29 March, 1833, s. 3, to third persons obtaining injunctions to arrest the execution of a judgment between other parties, not stating from what date, nor to what time, the interest allowed on the dissolution of an injunction is to run, such interest will be allowed from the date of the injunction to that of its dissolution, as from that time the judgment creditor can proceed with his execution.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

Schmidt, for the appellant.

Canon, for the defendants.

MORPHY, J. The petitioner represents, that she is the transferee of an obligation in writing whereby A. Fournier, on the 23d January, 1841, promised to pay to one Victor Dijoux, on the settlement of the succession of Nicholas Girod, a dividend of ten per cent on a legacy of \$20,000, to which said Fournier was entitled under the will of the deceased; and that Henriette, the widow of the late Fauché Cougot, having obtained a judgment in the court below against Fournier for \$1500, has caused the said legacy, on which the sum of \$16,400 yet remains due, to be seized by the sheriff of the parish of Orleans, who has advertised the same for sale. The petitioner avers, that by seizing the whole of said legacy and other property, much more has been seized than is sufficient to pay the debt of the seizing creditor; that if the sale be effected as advertised, she will lose her claim on said legacy; that the sale will do her an irreparable injury without its being at all necessary to protect the rights of the seizing creditor; that by thus seizing the whole of said legacy, the widow of Cougot has seized the right of the petitioner to two thousand dollars therein, which she was not authorized to do, inasmuch as a part thereof was sufficient to satisfy her claim.

She concludes by praying that an injunction may issue to the widow of Fauché Cougot, and to the sheriff, to restrain them from selling such portion of said legacy as may be necessary to cover her interest; that the legacy may be appraised; and the seizure thereof reduced to an amount sufficient to satisfy the claim of Madame Congot, &c. The injunction prayed for was granted by the judge, who afterwards, on the trial of the case, dissolved it, and decreed the plaintiff in injunction, and her surety to pay ten per cent interest per annum on the amount of the judgment enjoined, from the date of the injunction until paid, and \$150 as special damages. From this judgment the present appeal was taken.

The right of third persons to oppose an execution, is limited to cases where the person making the opposition is the owner of the thing seized, or has a privilege on it. Code of Pract. arts. 395, 396. 3 La. 495. The obligation of Fournier is only a promise or engagement on his part to pay a certain sum of money on a certain contingency. It did not transfer or assign to Dijoux any portion of the legacy he expected to receive from the succession of Nicholas Girod; but his receiving such legacy on the settlement of the estate, was made the condition of his obligation to pay the stipulated per centage, which was to become exigible only on such amount as he should actually receive. The plaintiff, therefore, as the transferee of this obligation, was without any right to interfere with the seizure made by the widow of Fauché Cougot, under her judgment against Fournier. The right given to the debtor to have the seizure reduced to an amount sufficient to satisfy the judgment and costs, is reserved by law to him alone. If he does not complain that too much property has been seized to satisfy the debt, no other party, we apprehend, can step in between him and his creditor, and make the objection. But even were it admitted that the plaintiff could exercise this right of her debtor, it would not avail her, as the thing seized in the present case cannot be sold by parcels. This legacy is a debt due by the heirs of Nicholas Girod, after the debts of the testator shall have been paid. They, or the executors of the estate, cannot, without their consent, be compelled to pay this claim to a number of transferees, whether by

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voluntary assignments or by legal transfers resulting from sales under execution. The sheriff must sell the credit or debt, which we have repeatedly held is indivisible, as between the debtor and creditor, without the consent of both. 5 Mart. N. S. 193. 6 La. 90. 8 La. 635. 3 Robinson, 432. The judge below, therefore, properly dissolved the injunction; but in our opinion he erred in decreeing that the interest to be paid by the plaintiff in injunction, and her surety should run from the date of the injunction until the judgment be paid. The law of the 25th of March, 1831, which by a subsequent enactment is made to extend to third persons obtaining injunctions to arrest the execution of a judgment between other parties, does not state from what date, nor up to what time, the interest is to run. In relation to such third persons, the most reasonable conclusion we can come to, is, to make the interest run only up to the date of the dissolution of the injunction, as from that time the judgment creditor is at liberty to proceed with his execution as if no injunction had been taken. Were it otherwise, the plaintiff in injunction, who does not owe the amount of the judgment, would have to pay interest on it, as long as it should remain unsatisfied; and if it was never satisfied, he would have nothing to pay, as there would be no time up to which the interest could be calculated. The record exhibits no evidence whatever of any special damages sustained by the judgment creditor.

It is, therefore, ordered, that the judgment of the Court of Probates be so amended as to give no special damages, and to allow interest only from the date of the injunction up to the time of its dissolution, and that the said judgment be affirmed in all other respects, the appellee to pay the costs of this appeal.

Kendall, for the use of &c. v. Bean and others.

WILLIAM G. KENDALL, for the use of John P. Gray, v. HORACE BEAN and others.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Kendall, pro se.*

Barker, and Roselius, for the appellants.

GARLAND, J. This action is instituted on a receipt or certificate of deposits, given by the defendants on the 30th of May, 1842, to the plaintiff, for \$1000, in the notes of the Agricultural Bank of Mississippi, which had been presented for payment to that institution unsuccessfully, and consequently bore interest. After describing the notes, the defendants say, they "promise to pay him (plaintiff) forty-five cents on the dollar, face and interest, or return him the said notes, on his calling for the same, and the return of this receipt." The plaintiff alleges, that the defendants have never returned him the notes so received, nor paid the stipulated value thereof; wherefore he asks for a judgment against them.

The defendants for answer admit the receipt of the notes, and the execution of the receipt or certificate in question; but aver that, on the 22d day of the month of June, 1842, the plaintiff applied to them for the said notes, which they produced, not having been able to dispose of them at the price mentioned, whereupon the plaintiff expressed a desire to sell them, saying he wanted money for immediate use, and offering to accept forty cents on the dollar, "*face and interest*," which defendants agreed to give, and paid the proceeds on the day aforesaid to the plaintiff, amounting to the sum of \$459 28; but it not being usual for defendants to grant certificates of deposit, and not recollecting having done so in this instance, they omitted to require the return of the one in question, when the money was paid. The defendants annex various interrogatories to their answer, directed to the plaintiff, and to J. P. Gray, for whose use this suit is brought. These interrogatories it is not necessary to state in detail, as they are to ascertain matters collateral to the main issue; but the plaintiff answered them, and stated many irrelevant matters. The

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court ordered a large portion of the answers to be stricken out ; and the defendants then propounded other interrogatories, which were calculated to elicit answers not bearing directly on the question, but to show the probability that the plaintiff was in New Orleans on the day in question, and thereby render more probable the evidence given by the defendants of having paid the amount. In answering one of the interrogatories, the plaintiff, without being called on to answer, said : " I have not at any time received the bank bills, or the proceeds of the sale of the same, which are specified in the receipt sued on in this cause."

The defendants excepted to all these answers, as being insufficient, irrelevant, argumentative, and not responsive to the questions, and asked that they might be stricken out. This request the judge refused, on the ground that the exception was too general, and wanted certainty.

On the trial of the case, the defendants proved by one of their clerks, that the plaintiff, on the day mentioned, called at the office of the defendants, who are brokers or bankers, for the aforesaid bank notes, which were delivered to him ; that a bargain was then made between the parties, by which the defendants purchased the Agricultural notes of the plaintiff, and paid for them. The witness, at the time of giving his testimony, was not in the employment of the defendants, but by referring to their day-book or blotter, he finds a calculation made of the proceeds of the notes in his own (witness's) hand-writing. Another witness, the book-keeper of the defendants, says that the entry was made on the books in his charge on or about the day stated. It is not our purpose, at this time, to make a minute statement of all the evidence, or to admit that the books of the defendants can be used as evidence, or to say anything likely to influence the future decision of the cause. We shall content ourselves with saying, that we are not satisfied with the conclusion the judge below has drawn from the testimony, and that we think justice requires us to remand the cause for a new trial. We do this, to give the plaintiff an opportunity of showing, as he alleges he can, that he was not in the State of Louisiana on the day in question, but was in the State of Mississippi ; a fact which, if proved, would probably be decisive of the case.

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The judgment of the Commercial Court is, therefore, annulled and reversed, and the cause remanded for a new trial, the plaintiff paying the costs of this appeal.

FRANCISCO DE PAULA DE LIZARDI and others v. WILLIAM A. HARDAWAY and others.

Sec. 3 of the stat. of 25 March, 1831, must be understood as allowing to the defendant in injunction, in case of its dissolution, the highest rate of conventional interest on the amount of his judgment from the date of the injunction to the time of its dissolution, and as leaving it to the discretion of the court to fix the measure of the damages he may be entitled to receive, subject to the restriction that they shall not exceed twenty per cent, unless it be proved that damage was sustained to a larger amount. The court is not bound to allow in all cases damages to the extent of twenty per cent; the amount allowed must depend upon the circumstances of the case. It is only where the principal sum for which the judgment enjoined was rendered bears no interest, that interest can be allowed at ten per cent on dissolving the injunction; where interest was allowed by the judgment enjoined at five per cent on a part of the principal sum, but no interest on the residue, the court should, on dissolving the injunction, allow interest at ten per cent on the latter, and at five per cent on the portion bearing interest at five per cent. Interest is to be allowed only on the principal sum for which judgment was rendered—not on the aggregate of principal, interest and costs.

APPEAL from the District Court of the First District, Buchanan, J.

G. Strawbridge, for the appellants.

L. C. Duncan, and Grymes, for the defendants.

SIMON, J. The plaintiffs are appellants from a judgment by which they, and their surety on the injunction bond, (also an appellant,) are made liable to pay to the defendants *ten per cent interest and twenty per cent damages* on the sum of \$13,492 42½ being the aggregate amount, principal, interest and costs, of a judgment rendered in favor of Robertson, Beale & Co. against the plaintiffs, (subsequently assigned to the defendants,) the execution of which was arrested by an injunction issued in this case at the request of the plaintiffs, on the allegations, regularly

sworn to, that the amount of the judgment was satisfied and extinguished by compensation, long before the suit of Robertson, Beale & Co. was instituted, and before the assignment to the defendants took place.

The record shows, that an execution having issued on said judgment against the plaintiffs, for the use of the defendants, assignees of Robertson, Beale & Co., on the 25th of April, 1843, to satisfy the sum of \$10,837 88, with legal interest on the sum of \$9275 from the 1st of February, 1838, till paid, and also the sum of \$227 87½ costs, the same was enjoined by the appellants, who, after issue joined by the appellees, and after an unsuccessful attempt to obtain a continuance of the cause, on the 13th January, 1844, discontinued their suit; whereupon the injunction was dissolved, and the judgment complained of was rendered.

According to the 3d section of the act of 1831, whenever an injunction obtained to stay the execution of a judgment is dissolved, the court, *in the same judgment*, shall condemn the plaintiff and surety to pay to the defendant, interest at the rate of ten per cent per annum *on the amount of the judgment*, and not more than twenty per cent as damages, unless damages to a greater amount be proved. We have always understood this law, as allowing to the defendant in injunction, the *maximum* rate of interest on the amount of his judgment, and as leaving to the discretion of the court to fix the *quantum* of damages which the defendant should be entitled to recover, provided those damages should not exceed twenty per cent, unless proof be adduced that he sustained damage to a larger amount; but we have never entertained the idea that the court was bound to allow not less than twenty per cent damages, (12 La. 125,) as the amount to be allowed must necessarily depend upon the circumstances of the case. Here, the judgment appealed from gives to the defendants in injunction, ten per cent interest upon the whole amount due them of *principal, interest and costs*, at the time the execution was enjoined; and it appears that a part of said judgment, to wit, \$9275, bore already five per cent interest, and that the balance, to wit, \$1562 88, bears none. According to the rules recognized in several of our late decisions, (19 La. 300,

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317, and 3 Robinson, 128,) we must again hold that the judge, *a quo*, ought not to have allowed more than five per cent interest upon that part of the judgment which already bears five; and that he should have allowed ten per cent only on the amount which bears none. We think also that he erred in allowing interest upon the aggregate amount of the judgment in principal, interest and costs, as it is clear, that thereby he allows the defendants interest upon interest, which the law does not appear to have contemplated. The law of 1831 gives ten per cent interest *on the amount of the judgment*, and not upon its amount, together with the interest which may have accrued thereon. As to the damages, we are of opinion that they are excessive; and that, under all the circumstances of the case, five per cent only should have been allowed. The judgment appealed from must, therefore, be corrected.

It is accordingly ordered, that so far as the judgment of the District Court dissolves the injunction, it be affirmed, but that as it relates to the allowance of interest and damages, it be reversed; and it is further ordered that the defendants and appellees do recover of the appellants, *in solido*, five per cent additional interest per annum on \$9275, and ten per cent interest per annum on \$1562 88, from the 27th of April, 1843, until the day the injunction was dissolved; and five per cent. damages on the said two sums forming that of \$10,837 88, which is the amount of the judgment enjoined, exclusive of interest and costs; and that the costs of this appeal be borne by said appellees.

FRANCISCO DE PAULA DE LIZARDI and others v. WILLIAM
A. HARDAWAY and others.

One who suffers a judgment to be rendered against him, without pleading in compensation a debt which he might have opposed to his adversary's demand, does not thereby lose his right of action against the plaintiff for the amount of the debt; but he must institute a separate action therefor, before the court having jurisdiction over the plaintiff's domicil. He cannot enjoin the execution of

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plaintiff's judgment on the ground of its being extinguished by compensation. C. P. 373.

An execution cannot be enjoined, on grounds which might have been pleaded in defence before judgment.

APPEAL from the District Court of the First District, *Buchanan, J.*

G. Strawbridge, for the appellants.

L. C. Duncan, for the defendants. No injunction will lie to stay execution, on grounds which might have been pleaded in defence before judgment. *Lafon v. Dessessart*, 1 Mart. N. S. 71. *Monroe v. McMicken*, 8 Mart. N. S. 513; *McMicken v. Mil-laudon*, 2 La. 181; *Garlick v. Reece*, 8 La. 101; *Peytavin v. Winter*, 8 La. 273; *Campbell v. Briggs*, 3 Robinson, 110; *Benton v. Roberts*, 3 ib. 226.

Grymes, on the same side.

SIMON, J. This appeal is taken from a judgment refusing to grant the injunction, applied for by the plaintiffs with the view of arresting the execution of a judgment rendered against them in favor of Robertson, Beale & Co. The appellants state in their petition, that the execution which they seek to enjoin was issued in favor of William A. Hardaway, residing in Mobile, and of the Bank of Mobile, in the suit entitled "*Robertson, Beale & Co. v. F. de Lizardi & Co.*" (the applicants,) wherein the appellees claim to be assignees of the plaintiffs and owners of the judgment rendered therein, under which they threaten to seize and sell the appellants' property, to an amount of \$13,940. The appellants deny the legality and validity of the assignment, or that any valid consideration was ever paid by the transferees therefor. They further represent that before the assignment, and even before the institution of the suit in which the execution sought to be enjoined was issued, the firm of Robertson, Beale & Co. was indebted to them in a large amount, to wit, in the sum of \$11,292 92, being the amount of two bills of exchange drawn on the 17th of February, 1837, by the said Robertson, Beale & Co., each for the sum of one thousand pounds sterling, in favor of Andrews & Co., on the house of Morrison, Cryder & Co., of London, payable sixty days after sight, transferred to appellants by the endorsement of Andrews & Co., and others. The bills,

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being dishonored and returned, were, by the said Robertson, Beale & Co., liquidated in the said sum of \$11,292 92, and notes at six and twelve months, secured by mortgage, were given as security on the surrender of the said bill of exchange; but the appellants aver, that the property mortgaged having been sold by judicial order, has produced to the petitioners absolutely nothing, &c. Wherefore they pray that the debt by them due to Robertson, Beale & Co. be decreed to have been compensated and extinguished, &c., and that the execution be enjoined.

The judge, *a quo*, based his refusal on the ground that the debt pleaded in compensation does not appear to be equally liquidated and demandable with the judgment against which it is opposed, and this perhaps would be sufficient to defeat the plaintiffs' attempt to arrest the execution of said judgment; but as the parties have thought proper to test their rights before us under the question, whether the appellants can be allowed to enjoin the execution complained of, on grounds of defence which existed and might have been pleaded before the judgment, we shall proceed to inquire whether a party who shows that he suffered judgment to be rendered against him, without pleading a compensation, which he had then and before, the right of opposing against his adversary's demand, can be subsequently permitted, not only to set up said compensation or set-off in a separate suit, but also to enjoin the execution of the judgment obtained against him.

The affirmative of this question has been strenuously urged by the plaintiffs' counsel, who, in support of his position, has referred us to several very respectable French authorities, which appear to sustain him, and to several decisions of this court, among which he relies particularly on the case of *Caldwell v. Davis*, 2 Mart. N. S. 135.

It is true that in the case of *Caldwell v. Davis*, this court seems to have adopted the rule recognized by the French jurists therein quoted, that compensation may be opposed even after judgment, and that it may be so opposed to the execution of the judgment; but the claim which was the subject of the controversy was not in existence, that is to say, did not belong to the party defendant until after the judgment had been rendered, and the real question which this tribunal had then to consider, was,

"whether, after a judgment rendered, and execution issued, the defendant in the suit could purchase a promissory note of the plaintiff, oppose it in compensation of the amount due, and suspend the operation of the execution, until the verity of the claim, thus set up is examined." The decision relied on does not go further than answering affirmatively to this question, and appears to be grounded particularly upon the fact that the defendant, having had nothing to oppose in compensation against his adversary's demand previous to the rendition of the judgment, his subsequently acquiring a liquidated claim against him, entitled him to show that said judgment was satisfied and extinguished by compensation; and thus he was allowed to suspend the execution under the rule that such compensation could be set up, according to the Spanish jurisprudence then in force in Louisiana, even in opposition to the execution of a sentence. In the case of *Palfrey v. Shuff*, same vol. p. 51, this court appears to have decided the same point differently; but there, it was not shown that the judgments set up in compensation had been obtained in the court from which the execution, sought to be stayed, had been issued. The cases cited from 12 Mart. 370, and 4 La. 400, are not applicable; and in the case from 11 La. 216, this court only intimated that *perhaps* an injunction to an execution could be obtained when the debt has been extinguished by legal compensation, previous to judgment; but no express opinion was given upon this point, which was clearly foreign to the issue then under consideration.

But under the provisions of the Code of Practice, and in the present state of our jurisprudence, can it be pretended, that the question here presented is yet unsettled? By art. 367 it is provided that, "the defendant may plead compensation, or set-off, at every stage of the proceedings, provided it be pleaded specially;" and art. 368 says that, "it may be pleaded either in the answer to the principal demand, or by a distinct and separate demand." Thus it is clear that our laws recognize two modes of pleading compensation, one by exception, and the other by a distinct and separate suit. But the demands must be set up simultaneously, before the same tribunal, and according to the rules set forth in arts. 369, 370, 371 and 372 of the Code of Practice, By the

terms of art. 373 it is provided that, "*if the defendant suffer judgment in the original suit, without pleading such compensation as he may have to oppose, as provided above, he shall not, on that account, lose his right of action against the plaintiff to recover whatever amount such plaintiff owes to him; but he must bring his action before the court within whose jurisdiction the plaintiff has his domicile.*" This article appears to be particularly applicable to the present case, and excludes the idea of the defendant being permitted to arrest and suspend the execution of the judgment rendered in the original suit, until the claim by him subsequently set up in compensation is determined by a judgment. His only remedy, if he has not thought proper to avail himself of the compensation before judgment, is to bring an action against his adversary before the court within whose jurisdiction his adversary has his domicile. The law says, he shall not lose his right of action, but he cannot exercise it but as a distinct demand, unconnected with the original one. In the meantime he must perhaps pay the amount of the first judgment. But whether he does so or not, he will not be deprived of his claim; and it is evident, that at least until it is liquidated, he cannot set it up in satisfaction of said judgment, and enjoin the execution thereof. Here, Robertson, Beale & Co., and the defendants, appear by the record to reside in Mobile; and, under art. 373, it is clear that they are not amenable in this manner before the court by which the judgment complained of was rendered. They ought to be sued before the judge of their domicile, unless, being absentees, they can be brought before the courts of this State, by the attachment of any property which they may possess in Louisiana.

Now, as far back as the case of *Lafon's ex'r v. Dessessart*, 1 Mart. N. S. 71, this court decided that, "it is not in the power of an inferior court to deprive a party, in whose favor it has rendered judgment, of the benefit which results from it, on the allegation of any fact that might have been opposed to him and prevented his obtaining judgment." Our jurisprudence is uniform upon this subject; and this shows that the case of *Caldwell v. Davis*, 2 Mart. N. S. 135, was decided upon a different state of facts and circumstances, which the tribunal considered sufficient

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to make it an exception to the general rule, viz: that the claim set up in compensation *had been acquired since the judgment enjoined* was obtained. Again, in *Monroe v. McMicken*, 8 Mart. N. S. 513, this court said, causes would never terminate, if injunctions could stop execution, and try matters over again which might have been offered in defence before judgment was given. So in *McMicken v. Millaudon*, 2 La. 181, this tribunal expressly remarked, that all matters then urged to delay the execution, ought to have been presented as a defence when the plaintiff contested the defendant's action, and that it was too late to claim the benefit of them. This doctrine was again recognized in two cases reported in 8 La. 101 and 271; and, in the case of *Benton v. Roberts*, 3 Robinson, 224, we again held, that an injunction cannot issue to stay an execution, on grounds which might have been pleaded in defence before the judgment. We have no reason to be dissatisfied with this branch of our jurisprudence. It is in accordance with the provisions of the Code of Practice, and we must conclude that the judge, *a quo*, did not err in refusing to grant the injunction applied for.

Judgment affirmed.

NIMROD HOWRIN and another v. JOSEPH CLARK.

- A judgment rendered in an action against the master and owners of a steamer, for damages on the ground of injury sustained by plaintiff through the fault of those in command of the steamer, is conclusive as to such fault in a subsequent action between the master and one of the owners, to recover from another his proportion of the damages, all of which had been paid by the former.
- A judgment rendered against the master and other owners of a steamer for damages, for injury sustained in consequence of the fault of the master, having been paid by the latter and one of the owners, they sued the other owner to recover his proportion of the damages. Defendant denied his liability to pay any thing to the master, who had the exclusive control of the boat at the time of the injury; and prayed that, for any amount which he might be condemned to pay to the other plaintiff, he might have judgment in warranty against the master: *Held*, that defendant is not bound to reimburse to the master any portion of the damages occasioned by his own fault (C. C. 2972); and that, though defendant, if he pay any portion of the loss, may have recourse against the master, the lat-

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ter cannot be cited in warranty, his liability not being a case of personal warranty within the meaning of art. 379 of the Code of Practice. *Per Curiam*: Until defendant pays a portion of the loss he has nothing to claim of his agent, and can have no judgment against him.

APPEAL from the Commercial Court of New Orleans, *Watts, J. L. C. Duncan*, for the plaintiffs.

Roselius, for the appellant.

MORPHY, J. The petitioners, who are co-proprietors with the defendant of the steamboat Hudson, seek to recover of the latter \$1001 50, being his proportion of a judgment rendered against them, *in solido*, in favor of one Thomas Clark, as owner of the steamboat Semaphore, which had been run into and greatly damaged by the Hudson. They allege that they have paid the whole amount of said judgment, and all the costs, and have since called upon the defendant to contribute and pay his part, which was one-fourth thereof, but that he refuses so to do. The answer, after a general denial, avers, that the judgment referred to in the petition was obtained on the allegation and proof of negligence, want of skill and fault of Nimrod Howrin, in the navigation and management of the steamboat Hudson, of which the defendant and the plaintiffs were then joint owners, but which at the time when the cause of action which gave rise to said suit occurred, was under the command and exclusive control of the said Nimrod Howrin; that defendant is not liable for any part of the loss sustained by reason and in consequence of said suit and judgment; that if he is responsible for any portion thereof to George Heaton, the other plaintiff, the said Nimrod Howrin is bound to warrant and defend him against such liability. The answer further avers, that all transactions in relation to the joint ownership of said boat between the defendant and the plaintiffs, have been settled, and that the plaintiffs have given him a full and complete discharge and acquittance from all claims arising from the joint ownership of the boat. The answer concludes by praying that the petition be dismissed with costs; but that, in case the plaintiff, G. Heaton, should recover, there be judgment in favor of the defendant against Nimrod Howrin, for any sum the defendant may be decreed to pay to Heaton, &c. The plaintiffs had a judgment below, from which the defendant has appealed.

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The admissions on the trial show that, the plaintiffs had paid the amount of the judgment and the costs in the suit of *Thomas Clark v. Joseph Clark and others*, and that, at the time when the collision took place on account of which damages were recovered, Nimrod Howrin was captain of the boat, and the defendant was not on board. The record of that suit was given in evidence on the trial below, in support of the defence set up in the answer. All the evidence adduced in that case, and on which was based the verdict given against the owners of the Hudson, on the alleged ground of carelessness and neglect on the part of the persons in command of her, appears not to have been reduced to writing. Although fourteen witnesses were examined, the record exhibits only the testimony of four of them, taken under commissions. This evidence, however, establishes clearly that the collision between the Semaphore and the Hudson was owing entirely to the fault of the persons on board of the latter boat; that the Semaphore was coming down the river, while the Hudson was going up, and had left sufficient room for the Hudson to pass up between her and the levée; that the accident happened in consequence of the captain of the latter boat improperly changing her course from the levée across the river, and that but for this inconsiderate change in the course of the Hudson, the two boats would have passed each other at a distance of more than one hundred yards, &c. Independent of this evidence, it appears to us that the judgment itself which was rendered in that suit, must be considered conclusive in relation to the only ground on which it could be given against the owners of the Hudson, to wit, fault or gross neglect on the part of the persons in command of the boat. To that suit Nimrod Howrin was a party defendant, and he cannot in this case dispute a fact which was established contradictorily with him, as well as with his co-defendants. Although liable, *in solido*, with Howrin as to third persons, it is clear that the defendant is not bound to reimburse to him any portion of a loss which happened through his own fault and carelessness as captain of the boat, and for which he would have been answerable to the defendant had the latter paid any part of it. Civil Code, art. 2972. This defence does not apply to George Heaton, the other plaintiff. The petition, which avers that de-

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fendant's interest in the boat was one-fourth, does not set forth the proportions in which the other three-fourths were held. We will presume that each of the plaintiffs had an equal interest therein, and will allow to Heaton one-half of the sum claimed as having been paid by both. In relation to the judgment which we are requested to give in favor of the defendant on his call in warranty against Howrin, we are of opinion that although the defendant may have a recourse to exercise against him, if he pays any portion of the loss, he has no right to call him in warranty in this suit. This does not present a case of simple or personal warranty, within the meaning of article 379 of the Code of Practice, which defines warranty to be "an obligation which one has contracted to pay the whole or a part of a debt, due by another to a third person." Until the defendant pays a portion of the loss, he has nothing to claim of his agent, and can have no judgment against him. 8 La. 37.

It is, therefore, ordered, that the judgment of the Commercial Court be reversed; and it is further ordered that the plaintiff George Heaton, do recover from the defendant, Joseph Clark, five hundred dollars and seventy-five cents, with five per cent interest thereon from the 15th of February, 1840, until paid, with costs below, those of this appeal to be borne by the plaintiff and appellee, Nimrod Howrin.

WILLIAM ENDERS and others v. THE STEAMER HENRY
CLAY, MASTER and OWNERS.

The owners of a steamer are liable for any injury to others, resulting from the fault of those charged with the navigation of the steamer.

It is to late, after an appearance and answer by the defendants and a trial on the merits, to move to set aside an attachment.

Where in an action commenced by attachment against a steamer, its captain and owners, the names of the owners are not set forth in the petition, but defendants answer to the merits without pleading any exception, and, on judgment being rendered against them personally, execute an appeal bond disclosing their names, no objection can be made to the irregularity of a judgment *in personam* against them, on the ground of the omission to set out the names of the owners.

APPEAL from the District Court of the First District, Buchanan, J.

Anderson, for the plaintiffs. A motion to dissolve an attachment is too late, after a trial on the merits. 7 Mart. 398. Defendants having pleaded to the merits, plaintiffs are entitled to a judgment *in personam*, though the attachment be dissolved. That there was an appearance is proved by the bonding of the property. Code of Pract. art. 259. 7 La. 390. Besides there was an answer by counsel. A plea and trial on the merits cures any want of citation. Code of Pract. art. 333. 4 La. 482.

Chinn, for the appellants.

BULLARD, J. This is an action brought by the owners of the steamboat Walk-in-the-Water, against the captain and owners of the steamboat Henry Clay, to recover damages sustained in consequence of a collision, alleged to have been caused by the fault of the latter. They recovered a judgment for \$1400, and the defendants have appealed.

The collision took place a short distance above the confluence of the Ohio and the Mississippi, in the former, near the left bank, where there is a slight curve in the stream, and not far above Cairo. The Walk-in-the-Water was ascending, had stopped at Cairo, and then started again, and crossed over the river into a part where the stream is shallow at low water. The Henry Clay was descending the river, and ran into the Walk-in-the-Water, striking her about amid-ships, and doing considerable damage. At the moment of the collision, which took place about 3 o'clock in the morning, and on a star-light night, though the wind was blowing fresh, the Walk-in-the-Water was near the bank, and could not have run much nearer with safety. The river is about a mile wide at that place. The ascending boat was standing in still nearer the bank to avoid the accident, the alarm-bell was rung, the engine stopped, and she was backing. She was in the position where an ascending boat usually is, hugging the bank under the point, to take advantage of eddies and a slack current. On the other hand, the evidence shows that the Henry Clay was far from being in the middle of the stream, as descending boats usually are, to take advantage of the strongest current;

that the pilot at the wheel saw the Walk-in-the-Water at the distance of two miles and a half, when she was crossing over the river; that the collision took place about a hundred yards from the bank; and that she was moving diagonally up, approaching the bank. It appears to us quite obvious, that the Henry Clay might have avoided the accident by keeping out further in the

eam, instead of persisting to keep in the track of ascending boats. It is not shown that the course of the boat was changed, although the pilot saw in what direction the Walk-in-the-Water was running, and might have avoided the collision by a slight change in the direction of the Henry Clay. This fact appears to us decisive of the controversy, notwithstanding the usual contrariety of statements on the part of witnesses on different sides; and we conclude, with the court below, that the defendants are liable. The defendants appeared by counsel and filed an answer. It was, therefore, of little importance whether the attachment, which was taken with a view to bring in the defendants, was maintained or not; and it was too late, in our opinion, after a trial on the merits, to move to set it aside. The defendants had already bonded the property attached, and given the security required by art. 259 of the Code of Practice.

Besides an argument upon the merits contained in the brief of the defendant's counsel, he contends that the proceedings *in personam*, against the steamer Henry Clay, master and owners, is irregular, the names of the owners not being set forth. To this it is a sufficient answer to say, that an answer to the merits was filed without any exception being first pleaded, and that the record contains a bond in which the names of the owners are sufficiently disclosed.

Judgment affirmed.

THE SECOND MUNICIPALITY OF NEW ORLEANS v. PIERRE
OSCAR LABATUT and another.

The stat. of 8 March, 1836, dividing the city of New Orleans into three municipalities, did not abolish the old city corporation, nor deprive it of the right of suing for the amount of forfeited bonds and recognizances, directed by sect. 4 of the stat. of 1 April, 1835, to be recovered for its use. There is nothing in the statute dividing the city into municipalities, nor in any other statute, giving to any municipality the right to recover the amount of a forfeited bond or recognizance executed before its Recorder.

APPEAL from the District Court of the First District, *Buchanan, J.*

Rawle, for the plaintiffs.

Bodin, for the appellants.

Roselius, for the First Municipality.

H. H. Strawbridge, for the Charity Hospital.

SIMON, J. The Second Municipality seeks to recover the amount of a bond taken by its Recorder for the appearance before him of P. Oscar Labatut, one of the defendants, on a charge of having embezzled and converted to his own use, funds of the Commercial Bank of New Orleans.

The defendants pleaded the general issue, further denying that the plaintiffs are the owners of the bond sued on, or that said bond has ever been forfeited, or constitutionally pronounced to be forfeited.

After issue had been joined by the defendants, the Charity Hospital and the First Municipality intervened, the latter claiming to be entitled to a portion of the bond sued on, in the same right as that set up by the plaintiffs; and the Charity Hospital claiming the benefit of the recovery of the whole amount of the bond, by virtue of an act of the legislature, dated the 11th of March, 1837.

Judgment was rendered below in favor of the plaintiffs for the whole amount of the bond; from which judgment the defendants, after having vainly attempted to obtain a new trial, took this appeal.

The only question which we have to consider in the present
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state of the case, is, whether the plaintiffs, who pretend to be the owners of the bond sued on, by virtue of the act of 1836, dividing the city into three distinct municipalities or corporations, are entitled to recover on the bond.

It is contended by the plaintiff's counsel that, except for liquidating its unfinished affairs, the old corporation has ceased to exist; that the act of the first of April, 1835, (Sess. Acts, p. 179,) under which the city of New Orleans was entitled to claim the benefit of the bond sued on, has ceased to be a part of the charter of the old corporation; and that, by the provisions of the act of 1836, the municipalities have respectively succeeded to all the rights allowed to the city by the law of 1835, on the bonds taken within their respective limits.

In the case of the *State of Louisiana v. Desforbes et al.*, 5 Robinson, 253, we held, "that from the moment the bond was forfeited, *the corporation of New Orleans became vested with the right to sue for the recovery of its amount through its attorneys*, whose duty it was to institute proceedings for that purpose, *for the use of the corporation*, and that the Attorney General could not enforce the payment of the bond in the name and for the benefit of the State." The question in that case was, whether the State could sue for the recovery of the bond; and, as we were of opinion, that the right of action had been abandoned by, and did not belong to the State, and that it should be exercised by the city attorneys for the corporation, we dismissed the proceeding instituted by the Attorney General. Here, however, a new party claims the benefit of the bond, and sues for its proceeds, and it behoves us to examine, as a new question, how far the plaintiffs' pretensions are supported by the laws on which they rely. Is it true that, except for certain purposes, the old corporation of New Orleans has ceased to exist?

The law of the 8th of March, 1836, (Bullard & Curry's Digest, p. 120,) was passed for the purpose of dividing the city of New Orleans into three municipalities, or sections, each with distinct municipal powers. Each of these municipalities became a part of the whole, forming together what was formerly called "the corporation of the city of New Orleans," still recognized to exist by different sections of the said act, which, it may here be re-

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marked, contains no absolute repealing clause, further than what is contained in the 26th section. But the plaintiffs' counsel, relying particularly on the 4th, 10th, 11th and 21st sections of the act of 1836, has attempted to show us, that the existence of the old corporation is inconsistent with the powers given to the three municipalities; and that the intention of the legislature was, that the old corporation should be replaced by the three new corporations therein created. By the 4th section, it is provided, that "each municipality shall possess all such rights, powers and capacities as are usually incident to municipal corporations; shall be capable of suing and being sued, &c.; and shall possess and exercise, within their respective limits, all such powers, rights, &c., as are now possessed and exercised by the corporation of New Orleans."

By the 10th section, it is enacted, that all laws of this State, conferring rights and powers and imposing duties on the corporation of New Orleans, or otherwise *providing for the government thereof, &c.*, shall continue in full force in each of the municipalities, respectively, until they are repealed, &c.

The 11th section gives to each municipality the exclusive right of making and enforcing all public laws and regulations within their respective limits, shows the extent of their exclusive jurisdiction, and mentions the exceptions to the rule.

And the 21st section provides, that nothing in the act shall be understood to prevent the city of New Orleans, *under the present corporate title thereof, from suing and being sued, and performing other corporate acts prescribed by law, whenever, and so far only, as such acts may be necessary for the mere purpose of liquidating the unfinished affairs thereof.*

Now, from the provisions contained in these and in the several other sections of the same act, we are not prepared to say that the old corporation has been abolished, or even that, although yet in existence, it should be deprived of the benefit of the act of 1835, conferring upon it the right of suing for the recovery of the bonds specially affected to its use. The 1st section recognizes its existence, by dividing it into three distinct sections or municipalities; the 9th section preserves the chief magistrate of the city, to be elected as theretofore, and to continue to exercise all the powers which he previously had, not incompatible with

the provisions of the new law. The 20th section creates a general council for its administration, with the powers therein described; and by the 4th section of a law of 1840, (B. and C.'s Digest, page 130,) it is provided, that "whereas doubts have arisen whether the corporation of New Orleans is capable of holding or possessing any real estate, &c., *the said corporation is hereby declared capable of acquiring, retaining and possessing, by donation or legacy, any property real or personal, whether situated within or without the limits of said city, &c.*" Furthermore, its existence is also clearly recognized in an act of 1843, p. 55, entitled "*An act to define the powers of the Corporation of the City of New Orleans.*"

As we said in the case of *The First Municipality v. The Commissioners of the Sinking Fund*, 1 Robinson, 289, it is an error to believe that "the municipalities have succeeded to the powers, rights, and privileges of the corporation created by the act of the 17th of February, 1805, and the various acts supplementary and amendatory thereof; they are the creatures of the act of 1836, and to it we must look for their powers, rights, and authority." Now, is there any thing in the law of 1836, which transfers to the municipalities the benefit of the law of 1835, under which the present suit is brought? Was not said law a part of the charter of the old corporation, which, except so far as it may be repealed by the 26th section of the law of 1836, is yet in existence; and can it be said that the provisions of the law of 1835, are contrary to the enactments of the law creating the three municipalities? It is true, the corporation may be considered as being in a state of liquidation; but it is represented by the Mayor and City Council, and is therefore susceptible of being administered as any other corporation. Nay, it may seem strange that a corporation, simply in a state of liquidation, should have the power, under the law of 1840, *of acquiring, retaining and possessing, by donation or legacy, any property, real or personal*, wherever it may be situated. Such rights and powers are incompatible with the idea, that the corporation to which they are granted has ceased to exist, or is in a state of liquidation leading to the end of its existence; and we are firmly of opinion, that if the old corporation is capable of acquiring and possessing real and per-

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sonal property by donation or legacy, and therefore, of doing all the acts necessary to preserve and enforce such rights, it is also capable of suing for the recovery of bonds which, donated by the State under the law of 1835, are to be, when forfeited, recovered for its use and benefit.

The solution of this question may, perhaps, appear contrary to the letter of some isolated provisions of the act of 1836, and particularly to the 21st section, which seems to limit the extent of the exercise of the acts of the old corporation; but again, we cannot understand the 10th section of said law, as conferring any other rights and powers upon the municipalities than those which may be necessary *for the government thereof*; and as it is nowhere mentioned in the law, that the municipalities shall be substituted to the privilege, or right, granted to the city in general by the law of 1835, and as the law of 1840, above referred to, seems to extend the capacity of the old corporation to cases in which property, real or *personal*, may be acquired and possessed by donation or legacy, we cannot come to any other conclusion, but that the right of recovering the bond sued on belongs to the corporation of the city of New Orleans, and cannot be exercised by the plaintiffs, or any of the other municipalities.

Furthermore; the law of 1835 says, that "all bonds and recognizances taken by the associate judges, *mayor*, or recorder, &c., shall, when forfeited, be recovered, &c." Now, if it were true, that the old corporation has ceased to exist, and that the three municipalities are respectively entitled to recover in its place the amount of the bonds taken within their limits, what would become of the bonds taken by the *mayor*? Would they belong to any of the municipalities? Certainly not. They must be appropriated and sued for, for the benefit and sole use of the city; and it seems to us clear, that if the city has a right to exercise an action for the recovery of such bonds, *through their attorneys*, the old corporation has equally the right of suing for and recovering any of the other bonds, since there is no provision in any of the subsequent laws giving them to the municipalities.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that ours be for the defendants as in case of non-suit, with the costs in both courts.

HENRY BRODE v. THE FIREMEN'S INSURANCE COMPANY.

Where the surety offered by a party to whom a suspensive appeal has been allowed, is insufficient, or has not been given in time to entitle him to a suspensive appeal, the order allowing the appeal should not be set aside, if the surety be sufficient, and the application was made in time, to entitle the party to a devolutive appeal. In such a case, the effect of the failure to comply with the requirements for a suspensive appeal, is to render it devolutive only, and to authorize the issuing of an execution.

The stat. of 22 March, 1843, sec. 2, dispensing with notices of judgment in certain cases, does not apply to the case of a judgment against a garnishee by whom interrogatories had been answered, rendered on a rule to show cause, where the rule was not served on the garnishee in consequence of his absence from the state; and where, in such a case, notice of judgment was subsequently served on the garnishee, the time within which an appeal will lie must be calculated from the date of the notice.

RULE on the Judge of the Commercial Court of New Orleans to show cause why a mandamus should not be issued. The facts of this case are stated in the opinion delivered by.

MORPHY, J. This is a rule on the judge of the Commercial Court of New Orleans, to show cause why a mandamus should not issue, commanding him to allow the petitioner, Lucius Chittenden, a suspensive appeal from a judgment entered up against him as a garnishee in this case. The facts upon which the application is based, appear from the petition and the return of the judge, to be the following:

Lucius Chittenden, being served with interrogatories to ascertain whether he was a stockholder of the Firemen's Insurance Company, how many shares he held in it, and what amount per share had been paid on said stock, on the 22d of December, 1843, answered, that he denied that the plaintiff had any right to make him a party to this suit, or to propound interrogatories to him in any manner, or that he could be made liable for the judgment rendered therein, or any part thereof. He further answered under oath to the interrogatories with a reservation of all legal exceptions, as follows, to wit:

To the first interrogatory: That he does not consider himself, by

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the 3d section of the charter creating the Firemen's Insurance Company, a stockholder in that institution.

To the second interrogatory : That, in March, 1839, he became the owner of sixteen shares of the stock of the Firemen's Insurance Company ; but that, as before stated, it became forfeited, and he ceased to be a stockholder therein, under the third section of the charter, long before the service of the interrogatories put to him in this case.

To the third interrogatory : That he has sold none of the said shares, and has not otherwise disposed of them than by forfeiture as aforesaid.

To the fourth interrogatory : That there has been paid on said stock, per share, about \$26 or \$27.

On the 13th of January, 1844, the plaintiff took a rule on the garnishee, to show cause, on the 18th of the same month, why judgment should not be rendered against him for \$360. Upon this rule the sheriff endorsed the following return : "*The within rule could not be served, L. Chittenden being out of the State.*"

On the 18th of January, 1844, judgment was entered up against Chittenden, in favor of the plaintiff, for \$360, as the amount due on sixteen shares at \$22 50 per share ; which judgment was signed on the 21th of January.

On the 25th of April following, a notice of this judgment was served upon the garnishee, and before the lapse of ten days from the date of such service, he applied for, and obtained from the judge, an order for a suspensive appeal from the judgment thus rendered against him, returnable on the 4th of May following, on his giving bond and security according to law. This bond he filed on the 30th of April, 1844, in the penal sum of \$600, with two competent and solvent sureties.

On the 2d of May, 1844, the plaintiff took a rule on the garnishee, to show cause, on the 9th of May, why the appeal taken should not be set aside, and execution issue, on the ground that the time prescribed by law for taking such appeal had elapsed. This rule the sheriff's return shows, was served on the 7th of May, on M. Greiner, in person. On the 9th of May, the judge made the rule absolute, and set aside the order he had previously made, allowing a suspensive appeal from his judgment. After stating

these facts, the petition of Lucius Chittenden alleges, that the plaintiff has taken, or is about taking out, an execution, and that the judge of the Commercial Court refuses to set aside his last mentioned order, and to allow a suspensive appeal, which refusal operates as a denial of justice to him.

Watts, Judge of the Commercial Court, showed cause against the rule. The answer of the garnishee is a confession of facts, entitling the plaintiff to an immediate judgment against him. In such a case, it is within the discretion of the court to say whether the garnishee shall be called on to show cause or not. If the case is very clear, judgment is given as a matter of course. In this case, the garnishee acknowledged himself to be owner of the stock, and admitted that he had only paid a certain amount thereon, leaving a balance due. So much of the answer as speaks of a forfeiture, does not set it forth as an averment, but argumentatively. The answers of the garnishee are a mere evasion; they do not aver that the stock had ever been declared to be forfeited. It is the practice of the court, *a qua*, always to allow a suspensive appeal when applied for, leaving it to the opposite party to move to set it aside, if the applicant be not entitled to it.

B. Lowndes, for the plaintiff. The rule taken by the plaintiff on the garnishee was unnecessary and superfluous; and the judgment rendered against him, was well rendered as *pro confesso*. The rule must be regarded as a mere *ex parte* motion for judgment. The neglect or refusal, merely, of the garnishee to answer the interrogatories which had been propounded to him, would have been a legal confession of assets, and sufficient authority for a judgment against him, without a rule. Code of Pract. art. 263. *Parmly v. Bradbury*, 13 La. 353. *Deblanc v. Webb*, 5 La. 82.

By the public act incorporating the Insurance Company, the shares are fixed at \$50, all which sum was liable to be called in. The garnishee confesses that he has paid not more than \$27, per share. The answers of the garnishee admit the purchase of 16 shares, and that he has never sold them. The first answer states simply the *opinion* of the garnishee,—that *he does not consider himself a stockholder*," &c. It is not therefore responsive to the interrogatory; and taken in connection with the admissions in the following answers, entitled the plaintiff to judgment, without a rule. Charter of the Firemen's Ins. Co. Act 10 March, 1838, sec. 1 and 8. *Hart v. Dahlgreen*, 16 La. 559.

The garnishee had suffered the period prescribed by law for taking a suspensive appeal to elapse before making his application.

No notice was required by law to be given to the garnishee of

the judgment which had been rendered against him. The notice though given, was not given either at the request of the plaintiff or his counsel; but through a mistake of the clerk. The garnishee having been cited to answer the interrogatories, and having actually answered them, became a party to the suit, and notice of a judgment rendered in such a case, is now dispensed with. Act. 20 March, 1843.

The extent of the garnishee's liability is to be tested by his answers to the interrogatories. *Oakey v. Miss. & Al. Railroad Co.* 13 La. 570.

It is shown by the answers of the garnishee, that there was an unpaid balance in his hands, due the defendants, of \$23 per share, on 16 shares of stock. He is considered as a mere stakeholder between the parties, (*Kimball v. Plant et al.* 14 La. 511,) and only called upon to declare what property is in his hands, and having so declared, the property is liable to be seized under execution. The effect of the answers is, to show the extent of the property liable to be seized, and the effect of the judgment against the garnishee, is merely to order the property so designated to be seized. He is therefore no more entitled to judgment, than any person would be in whose hands property had been seized, without the preliminary steps of interrogatories and answers.

MORPHY, J. The judge below was of opinion that, although the garnishee had denied his indebtedness, and stated that his stock had become forfeited under the third section of the charter of the Firemen's Insurance Company, the plaintiff was entitled to an immediate judgment, without any rule or notice to him, because his answers confessed all the facts necessary to render him liable, and did not allege that any proceedings had been taken to create the forfeiture they speak of, or that a forfeiture had been in fact declared. Whether this be so, and whether the judgment of the 18th of January, 1844, has been legally rendered, we are not to inquire on the present rule. The legality and correctness of the judgment can be examined only on an appeal from it, brought before this court. The inquiry to which we must confine ourselves is, whether the suspensive appeal which had been granted in this case, was correctly set aside on the rule taken by the plaintiff. The judge states in his return, that the practice of his court has always been, to allow a suspensive appeal when applied for, leaving to the other party to move to set it aside, if the appellant be not entitled to it. It appears to us, that even where the security offered by the appellant is found to be insufficient to

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sustain a suspensive appeal, or has not been given within the time prescribed, the order for an appeal is not to be set aside on that account, if it has been prayed for within one year after rendition of the judgment. The only effect of the party's failure to comply with the requirements of the law for a suspensive appeal, is to render the appeal merely devolutive, and to authorize his adversary to take out his execution. In the present case, no objection was made to the appeal bond given by the garnishee; but the ground upon which the order for a suspensive appeal appears to have been set aside is, that he suffered the time prescribed by law for taking such an appeal to elapse, his application having been made only in April, when the judgment had been signed on the 24th of January, 1844. It is said, that it is from this last mentioned date that the ten days within which a suspensive appeal is to be taken must be counted; as, under the law of the 22d March, 1843, "relative to appeals and notices of judgments," the garnishee was not entitled to any notice of the judgment rendered against him. The law referred to cannot, we think, be applied to a case like the present; it provides clearly for the ordinary cases, where, according to the well established rules of all our courts, suits are set down for trial on particular days, or where notices are given of all motions made, or rules taken in such suits. Parties in the ordinary course of practice cannot but be aware of the judgment rendered against them; the law presumes such knowledge, and therefore dispenses with the notices formerly required; but this presumption of knowledge cannot exist in this instance, as the record shows, that no service was made on the garnishee of the rule by which judgment was to be demanded on his answers to the interrogatories. It was probably in consequence of this *ex parte* proceeding, that it was found expedient to notify him of the judgment rendered against him, although such notice was no longer necessary in ordinary cases. The right of a garnishee to appeal, so far as his own interest is concerned, cannot be questioned. Within the legal delay after he was informed of the judgment against him, he filed his appeal-bond, and obtained an order for a suspensive appeal. Under the peculiar circumstances of this case, it appears to us, that the order

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first made should not have been set aside, and that the garnishee should have the benefit of a suspensive appeal.

Let the rule be made absolute.

THOMAS POWELL v. JOHN KELLAR.

APPEAL from the Commercial Court of New Orleans, *Watts, J. C. M. Jones and Benjamin*, for the plaintiff.
Conklin and Hoffman, for the appellant.

GARLAND, J. This suit was instituted to recover the sum of \$19,135 29, which the plaintiff alleges to be owing to him, as a balance in his favor, on a settlement of accounts made on the 3d of April, 1839, and for various sums advanced and paid for the defendant's use and benefit since that period, and for the amount of several promissory notes held by him, (the plaintiff,) drawn or endorsed by the defendant individually, or as a member of the late firm of Kellar & Williams; all of which are set forth in the petition in specific allegations. The answer, after a general denial, charges that the settlement relied on was entered into by the defendant in ignorance of his rights, and was procured by the fraud of the plaintiff; and further denies any indebtedness in any manner.

The plaintiff gave in evidence the notes described in the petition, and the settled account, to show the errors and overcharges; in opposition to which, the defendant presented a mass of testimony relating to many transactions between them, and between the plaintiff and the late firm of Kellar & Williams. It appears that in 1836, Kellar & Williams instituted cross actions, for the purpose of settling their partnership affairs; and that, pending the suits, the plaintiff, by consent of parties, was appointed a receiver of the debts due to them; that he collected about \$12,000, and paid many debts owing by that firm. He was called on for an account of the funds, by a rule in the District Court, where the suits of Kellar & Williams were pending, and accordingly pre-

sented an account, which was opposed, and all his offsets or payments rejected, from which judgment he appealed, and was relieved by this court. See 3 Robinson, 321, where all the facts are fully stated. Whilst that appeal was pending, the plaintiff withdrew some of the notes he had pleaded in compensation, and which he then said were taken up with the funds of Kellar & Williams, and included them in this suit. This fact appeared to our satisfaction, when the record in the case of *Powell v. Kellar & Williams*, decided in June, 1843, was before us; but we could not grant the necessary relief in the form in which the case was then presented. Before the appeal of Powell in the case of *Kellar & Williams* was decided, the judgment now before us was rendered, and includes some of the notes paid with the money of the drawers, as is shown by the account rendered by the plaintiff as receiver. For instance, the sum of \$4000, with interest and costs of protest, is claimed as being due on two mortgage notes given to Joshua Baldwin, which a reference to the account rendered as receiver in the District Court, shows were there charged to Kellar & Williams. The amount of a note for \$1196 60 drawn by Sarah Baum, payable to Kellar, and endorsed by him, is also claimed; and it is shown, that Powell is, or was, the legal representative of her estate, and that he has a large amount belonging to it in his hands. When we refer to the settlement made on the 3d of April, 1839, we see that it is made up of extravagant charges for commissions, for endorsing, and becoming surety on appeal and attachment bonds, in some of which Powell had an interest himself, and of other items not sanctioned by law. The various transactions to which the plaintiff and defendant were parties with Williams and others, have been mingled in a manner calculated to confuse and mislead any tribunal; it is therefore not surprising that the jury found a verdict for the plaintiff. We think it erroneous in several particulars, and will endeavor to get at the justice of the case by remanding it for a new trial.

It is, therefore, ordered, that the judgment of the Commercial Court be annulled, the verdict set aside, and the cause remanded for a new trial, to be proceeded in according to law; the plaintiff paying the costs of this appeal.

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WILLIAM BROWN v. THE PONTCHARTRAIN RAILROAD COMPANY.

Where, in consequence of the neglect of the agents of a railway company to chain or put blocks under the wheels of cars left standing on a track, constructed on a pier used as a public highway, one, who was crossing the track at a point over which it was necessary for him to pass in order to reach his vessel, moored to the pier, is, during a dark night, and without any fault on his part, run over and seriously injured by the cars, which had been put in motion by a strong wind, he will be entitled to recover damages to the extent of the injury sustained. C. C. 2294, 2295.

APPEAL from the District Court of the First District, *Buchanan, J.*

Schmidt and Roselius, for the plaintiff, cited Civil Code, arts. 2294, 2295, 1928, § 3. 11 Toullier, No. 121, p. 153. Merlin Rep. vol. 26, *verbo* Quasi-Délict. Domat, vol. 1, b. 2, tit. 8, sect. 4. Ibid. tit. 9, Des Engagemens, &c., par des cas fortuits. 2 La. 73. 7 La. 575. West. Law Journal, vol. 1, No. 5, p. 203. Graham on New Trials, 417. Sayer's Law of Damages, 214, *et seq.* 2 Wilson, 205. 2 Wendell, 432. 17 Mass. Rep. 503. 9 Serg. & Rawl. 94. 2 Aiken, (Ver.) Rep. 255. 2 Hill, (S. Ca.) 573. 4 Hamm. (Ohio,) 500, 514. Wright, (Ohio,) 603. 4 Wash. C. C. Rep. 106. 4 Serg. & Rawl. 16. 7 Mass. Rep. 187. 7 Cowen's Rep. 485. 6 Petersd. Abridg. 634.

Eustis, for the appellants, cited *Lesseps v. Pontchartrain Railroad Co.*, 17 La. 362. *Fleitas v. Same*, 18 La. 339. *Chase v. Mayor et al.*, 9 La. 347. In the case of *Butterfield v. Forrester*, 11 East, 60, Lord Ellenborough, Chief Justice, says: "A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize a person purposely to ride up against them. One person's being in fault will not dispense with another's using ordinary care for himself.—Two things must concur, to support this action—an obstruction in the road by the fault of the defendant, and no want of ordi-

nary care to avoid it on the part of the plaintiff." This was a case of an obstruction of a highway. See also *Barkley et al. v. New York Dry Dock Co.*, 2 Hall's R. 156. *Bush v. Brainard*, 1 Cowen, 78.

MORPHY, J. This is an action in damages for injuries sustained by the plaintiff, in consequence of the alleged carelessness and neglect of the company or its agents. The petition sets forth in substance, that the defendants obtained their charter of incorporation for the purpose of constructing a rail-road to serve as a communication and public highway between the city of New Orleans and Lake Pontchartrain; that in order to render their charter more advantageous, the company was authorized to construct, and did construct harbors, piers, wharves, and breakwaters at the junction of said rail-road with Lake Pontchartrain, which works have been of great benefit to them; that, as a consequence thereof a port of entry, known as Port Pontchartrain, has been established at that place; that the wharves thus constructed at the junction of the rail-road and the lake, are public highways and thoroughfares, necessary to the free communication with the port, and the land, as well as with the said rail-road; and that every body is entitled to the free and unmolested use of them, in so far as the rights and privileges of the company are not interfered with. The petition further charges that, on the 30th of August, 1842, the plaintiff arrived at the said Port Pontchartrain in a small vessel, which he used for the purpose of fishing and oystering; that having secured his vessel, he proceeded ashore across the wharf of the company, to attend to his business; that between the hours of seven and eight o'clock in the evening of that day, a thunder storm suddenly arose, accompanied with a heavy wind and rain, which rendered it necessary for him to look to the safety of his vessel; that while he was proceeding towards his vessel, across the wharf of the company, with every possible precaution, he was knocked down and run over by several baggage cars belonging to said company, which had been heedlessly and without sufficient care, left standing on the wharf by the defendants, or their agents; that by being thus knocked down and run over, he has suffered various wrongs and grievous injuries, and received wounds which put his life in danger, confined

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him to his bed for upwards of two months, and caused him to lose his left arm, which it became necessary to amputate, thus crippling him for life, disabling him from earning his bread, and entailing on him for the remainder of his days much pain and suffering. The petition avers, that all these sufferings and injuries are attributable to the neglect, remissness, and inattention of the company, or its agents, and that they, (the company,) are bound to indemnify him therefor; and it concludes with a prayer for damages to the amount of \$6000, and for a trial by jury. The defendants pleaded the general issue. There was a verdict and judgment below in favor of the plaintiff for \$4000. From this judgment the defendants have appealed, after an unsuccessful attempt to obtain a new trial.

The record comes up without any bill of exceptions to the evidence received on the trial, and may be considered as presenting only a question of fact, to wit, was the injury sustained by the plaintiff caused by the neglect of the company, or its agents? If it was, the law of the case is perfectly clear. Corporations, like natural persons, are liable for the wrongful acts and neglects of their servants, or agents, done in the course, and within the scope of their employment. *Angel & Ames*, p. 174. 5 La. 463. 11 La. 86. 1 Robinson, 178. Civil Code, arts. 2294, 2295. *Merlin*, Rep. vol. 26, *verbo*, Quasi Délit. The evidence shows, that on the night of this unfortunate occurrence, the wind, which began to blow very hard about 8 o'clock, put in motion and propelled two wood or baggage cars, which had been left on the wharf of the Pontchartrain rail-road, and which, it appears, had been neither chained nor secured by blocks. In their course, these cars knocked down and run over the plaintiff, who, in company with one Nelson, was at that moment walking on the wharf, and going toward the port at the end of the rail-road. As the night was dark, they were walking hand in hand, and feeling their way with their feet. When the accident happened, the plaintiff had just reached a place where the whole wharf is covered with rail tracks in every direction, and over which it was necessary for him to pass on his way to his vessel, about the safety of which he entertained fears on account of the storm which had just broken out. Had the cars been chained, or had

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blocks been placed under the wheels to prevent them from revolving, this accident would not have happened; and from the testimony of the defendant's own witnesses it appears, that this precaution was thought a necessary one, and that orders had been given to fasten or secure the cars every night, by placing fire wood or blocks under the wheels. This duty, it appears, was sometimes entrusted to a black man in the service of the company. It is not shown that it was performed on that particular night, although the rule was to block the cars every night. Some mention is made by the witnesses of a practice by which the fishermen were suffered to use the cars after dark to take their fish to town, and an inference is attempted to be drawn from it, that some of these men might have removed the blocks placed in front of the cars. This inference is considerably weakened, if not destroyed, by the improbability that the fishermen would have thought of taking their fish to town on such a windy and rainy night as that is described to have been. In the absence of any proof to the contrary, we must believe that the cars had not been fastened on that evening, as they should have been, and as they generally were, after dark. Had they been properly secured, it would have been impossible for the wind to propel them. For this neglect of their agents, the defendants are clearly answerable. The counsel for the defendants have referred to various authorities, and to our own decisions, to show that where, in cases of this kind, both parties are in fault, the party who claims damages cannot recover. Admitting the law to be as stated by the counsel, we cannot see how the plaintiff was in fault in the present case. He is represented by all the witnesses to have been sober on that evening, as he always was, being a man of sober and temperate habits. He was walking on the only road which could lead him to the place where his business called him. That way or road he had a right to use for the purpose of reaching the port where his vessel was moored, well knowing that no locomotive runs on the wharf after dark. Nothing would probably have befallen him, but for the neglect of the agents of the company, in not properly securing the cars on that night, as it is shown they were ordered to do every night.

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As relates to the extent of the damages, the evidence shows, that the plaintiff, who is a ship carpenter, is about 46 years of age; that he can earn from \$2 50 to \$3 50 per day; and that in consequence of the loss of his arm, he is disabled from following his trade; that he has had heavy expenses to pay for medical attendance, hospital fees, &c. Although the sum allowed by the jury may be considered as a very liberal one, we cannot say that, under the circumstances of this case, it is more than a compensation for the lasting injury and suffering inflicted upon the plaintiff. It is the peculiar province of the jury to assess the damages in cases of this kind, and with their finding we will not interfere.

Judgment affirmed.

THE MERCHANTS INSURANCE COMPANY OF NEW ORLEANS
v. EDOUARD CHAUVIN and others.

The cashier of a bank has, *prima facie*, authority to endorse, on behalf of the bank, negotiable paper held by it, in payment of its debts. *Per Curiam*: He is the general agent of the bank, through whom all its money transactions are conducted. His signature is generally considered to be that of the bank, in all its negotiations; and his endorsement will be presumed to be that of the bank, without its being necessary to show any special authority.

APPEAL from the District Court of the First District, *Buchanan, J.*

T. A. Clark, for the plaintiffs.

Marsoudet, for the appellants.

MORPHY, J. This action is brought by the plaintiffs as the holders of a promissory note, drawn by Chauvin & Levois, to the order of, and endorsed by, Augustin Vincent Roger. This note, which had been given to the First Municipality in part payment of property purchased by the drawers, was afterwards specially endorsed by that corporation to the Citizens' Bank of Louisiana, and by the latter institution endorsed in blank, through their cashier, J. B. Perrault. There was a judgment below

against the drawers and the two first endorsers, *in solido*. Chauvin & Levois, and Roger have appealed.

Various grounds of defence, which had been set up in the answers of the defendants, were abandoned in argument in both courts. The only points which the appellants now make, are : 1st. That the note sued on, having been discounted by the Citizens' Bank, that institution could not make any sale or transfer of the same. 2d. That the note was not legally transferred by the endorsement of the cashier alone, and that therefore the plaintiffs had no right to recover under such endorsement.

I. We are unacquainted with any law which prohibits a corporation from applying its negotiable funds, as well as its mortgaged capital, to the discharge of its debts and obligations. But in the present case the transfer by the Citizens' Bank was made under an express provision of the law of the 7th of March, 1842, authorizing the banks to settle their weekly balances in notes and securities in the possession of the debtor bank. The evidence shows, that this note was transferred to the Consolidated Association Bank in payment of a balance due to it by the Citizens' Bank, and was afterwards given to the plaintiffs by the Consolidated Association, in payment of deposits due to them.

II. In relation to the legality of the transfer, by the endorsement of the cashier, we have been referred to our decision in the case of the *United States v. Fleckner*, 8 Mart. 809. In that case, a resolution of the board of the directors of the Planters' Bank was exhibited, purporting to authorize the *president and the cashier* to liquidate the balance due to the plaintiffs. "We do not think," said the court, "that it follows from this resolution, that the president and the cashier were authorized to transfer the property of the bank by their endorsement; but if it could be so construed, the signatures of both ought certainly to be deemed necessary." In the present case no such resolution is shown, requiring the signature of the president. The question is, whether the cashier of a bank has not, *prima facie*, authority to endorse, on behalf of the bank, negotiable paper held by it, in payment of its debts. We think that he has such authority. He is the general agent of the bank, and the executive officer through whom, and by whom, all the money transactions of the institution are conducted. His signature is generally considered as

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that of the bank all in its negotiations; and his endorsement will be presumed to be that of the bank, without its being necessary to show any special authority. Angel & Ames, 173. Story on Agency, § 114. 3 Mason, 506. 8 Wheaton, 360. No attempt has been made to show that the cashier had no authority to endorse this note. The evidence proves, that it was given in payment of a debt due by the Citizens' Bank. The cashier's endorsement was only the means of evidencing the transfer, and giving negotiability to the note.

Judgment affirmed.

THE WARDENS OF THE CHURCH OF ST. LOUIS OF NEW OR-
LEANS v. ANTOINE BLANC, Bishop of New Orleans.

A vacancy in the office of Curate of the Church of St. Louis of New Orleans, cannot deprive the corporation of the faculty of suing. The Curate is an *ex officio* member of the board of Wardens, having but one vote, like any other member, in its deliberations. • Stat. 7 March, 1816. 22 March, 1822.

The statutes of 7 March, 1816, and 22 March, 1822, incorporating "The Wardens of the Church of St. Louis of New Orleans," do not give the wardens a right to appoint, in the theological sense of the word, a curate, but only to provide for his salary; but they have a perfect right to withhold all salary from any person whatever, and even to prevent one claiming to be curate from entering the church belonging to the corporation. *Per Curiam*: The legislature have not, and could not, authorize the wardens to interfere in matters of mere church discipline and doctrine, nor constitutionally declare what shall constitute a curate in the Catholic acceptation of the word, without interfering in matters of religious faith and worship, and taking a first step towards a church establishment by law.

A bishop cannot be made liable in damages for any expression of opinion as to the extent of his episcopal authority, nor for any act or omission in the exercise of his spiritual functions. Arts. 2294, 2295 of the Civil Code do not apply to such cases. Such acts or omissions violate no legal right, nor do they involve any dereliction of legal duty or obligations. Courts of justice enforce civil obligations only—not spiritual ones.

Malice is of the essence of slander. Unless it be alleged, no action can be maintained for a libel.

A corporation cannot maintain an action for slander.

The Spanish ecclesiastical laws have no longer any force in this State.

The relation between a bishop and the wardens of a church implies no civil contract, and consequently gives rise to no civil obligation. It is not a "contract

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having for its object the gratification of any intellectual enjoyment, whether in religion, morality, or taste, or any convenience or other legal gratification," within the meaning of art. 1928, § 3, of the Civil Code.

The right to nominate a curate, or the *jus patronatus*, of the Spanish law, is abrogated in this state.

The wardens of the church of St. Louis of New Orleans are authorized to administer the temporalities of the church, and are responsible only to their constituents for the manner in which they may administer them. They cannot compel the bishop to institute a curate of their appointment; nor is he, in any legal sense, subordinate to the wardens of any one of the churches within his diocese, in relation to his clerical functions.

In framing the State Constitution of 1812, it was deemed unnecessary to insert any restriction upon the power of the legislature on the subject of religious sentiments or worship, as it had already been settled, by solemn compact, between the original states and the people of the territory, unalterable but by common consent, under the act of congress of 2d March, 1805, and in conformity with the ordinance of that body of 13th July, 1787, that religious freedom, in its broadest sense, should form the basis of all laws, constitutions and governments which forever after might be formed within said territory.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

The petitioners represent: "That by an act of the Legislature of the State of Louisiana, they were created, and are a body politic in fact and law, *de jure et de facto*. That the church of St. Louis of New Orleans, belonging to the said body politic, was built, finished and expressly appropriated to the use of the Catholic religion, in the year of our Lord one thousand seven hundred and ninety-four. That at that time the said church, destined to replace the parochial church of the same name which had been erected in New Orleans under the French government, was by competent authority, and with the consent of its founder Don Andres Almonaster y Roxas, who had caused it to be built at his own proper expense, erected into a cathedral, or principal church, to be the seat of a bishop's ministerial functions.

"That by the French laws, which were alone in force in Louisiana under the French government, until the establishment of the Spanish government, that is to say, until the possession which was taken thereof by O'Reilly, in the name of his Catholic Majesty, in virtue of the cession made by France, the rights of patronage which shall be hereafter defined, was recognized, established and consecrated as a right inherent to the property, in favor of every person who had built a church at his own expense.

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That, at the time of the taking possession of Louisiana by and in the name of Spain, the French laws aforesaid ceased to have their effect therein, and were replaced by the Spanish laws which were then introduced. That the Spanish laws continued to be in full vigor in this country in all matters embraced in their provisions, as well under the territorial government as under our present State government, except in such cases where they might be contrary to the constitution of the United States and to the constitution and laws of the State of Louisiana, until the end of the year one thousand eight hundred and twenty-eight, at which time, such of the said laws as were known under the name of civil laws, were abrogated by a special enactment of the Legislature of this State. But petitioners maintain, that all that part of the said Spanish laws, known under the name of ecclesiastical laws, which is not repugnant to the constitution of the United States, to the treaties made in virtue of said constitution, to the laws of Congress, and to the constitution and laws of the State of Louisiana, is in full force and vigor to this day, in all matters relative to the temporal administration or discipline of the Catholic Church. That, by the ancient laws of Spain, the right of patronage above mentioned, was, for the same motives, the same as under the French laws. But that, by the laws of the Indies destined to regulate and govern the Spanish colonies in America, the said right of patronage was exclusively attributed and reserved to the King of Spain, with the express and formal prohibition under severe penalties, to any person or authority whatsoever, to arrogate to himself the exercise of said right directly or indirectly.

"The right of patronage thus attributed and exclusively reserved to the king consisted of what follows, namely :

"The king presented and nominated the archbishops, the bishops and other prelates to the Bishop of Rome, known under the name of the Pope, who approved said nominations, unless the nominees had not the qualifications prescribed by the canons, and gave to the nominees the institution necessary.

"The king nominated and designated to the archbishops, or to bishops, priests whom he destined to the service of all the churches ; and those prelates were bound, except for good and legitimate

reasons duly proved, to grant to the said priests the canonical institution necessary for the exercise of the functions and powers of their office. And as petitioners have already remarked, the prohibition to assume the exercise of the said right of patronage extended to all persons secular or ecclesiastical, order, community, convent, &c. of any state, condition, quality or pre-eminence whatsoever.

"Petitioners here allege, that by the effect of the retrocession of Louisiana to France by Spain, the laws of France in ecclesiastical as well as other matters, were so far from being introduced in Louisiana by the taking possession thereof by the Prefect Laus-sat, that they were never promulgated therein ; a formality which was indispensable according to the fundamental laws of the French republic then existing, to give them force or enable them to be executed. That consequently, and as it has always been recognized by our jurisprudence under the state, as well as under the territorial government, the Spanish laws, with the exception already mentioned, have continued to be in full force and vigor in Louisiana.

"But petitioners likewise allege, that the effect of the treaty of cession of this country to the United States could not be and has not been to reserve the right of patronage which the King of Spain had attributed to himself, as above set forth, and still less to transmit the same to any public functionary of the United States, or to any prince, potentate, or foreign government. That consequently the right of patronage has reverted to those persons in whom the same was vested by the Spanish laws existing prior to the laws establishing the royal patronage, and that said right may be and must be exercised by them in so far as the said right contains nothing unconstitutional. That by the laws prior to the royal patronage, which in itself is nothing but an encroachment, and the consequence of other encroachments of despotism over the liberties of the people, and a violation of the right of property and of the rights inherent to property, it was to the people, to the Catholics and to their clergy, that the right of electing and nominating their prelates, archbishops, bishops, &c. did belong, without any power on the part of the Bishop of Rome or his agents to meddle or interfere with the same, and without any

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right or pretension on his part, short of an usurpation of authority, to elect the said prelates, archbishops, bishops, &c.; and likewise by the said laws prior to the royal patronage, the right of electing and nominating the priests destined to the service of the parochial and other churches, belonged to the owners of those churches, and was inherent in the property, and as such was transferable to their heirs and successors.

"Petitioners further allege that, in accordance with these principles, the Catholics of New Orleans ever since the year eighteen hundred and five, assembled together, took possession of the edifice called the Church of St. Louis of New Orleans, together with all the property thereto appertaining, and nominated among themselves administrators under the name of wardens, to administer all the affairs and revenues of the said church, together with all the property to the same belonging. That those wardens have faithfully discharged their duty, according to their mandate; that they did nominate the Reverend Father Antonio de Sedella, then curate of the said church, to continue to be their curate. That after said nomination, a certain Abbé Walsh, styling himself Grand Vicar, vested with the spiritual administration of the diocese of Louisiana, and claiming the right to nominate the said curate as belonging to himself in his said capacity, troubled and molested the said Antonio de Sedella in the possession of his office as curate; but that a suit having been brought by said Abbé Walsh as plaintiff, a judgment was rendered by the superior court of the territory of Orleans, which totally upset the pretensions of the said Abbé Walsh, and maintained the said Father Antonio de Sedella in the full possession and enjoyment of his office.

"That posterior to said judgment, about the year one thousand eight hundred and ten, another priest known under the name of Abbé Olivier, styling himself Apostolical Vicar, vested by the Bishop of Rome with the spiritual administration of the diocese of Louisiana, set up the same pretensions from which the Abbé Walsh had been debarred by the aforesaid judgment; that he endeavored to remove Father Antonio from his office, but that he dared not to resort to our tribunals to effect this end; and that finding that his assumed authority was not recognized, he contented himself with addressing to the General of the order of the

Capuchins in the island of Cuba a lengthy phillippic against Father Antonio ; which, were it not for the respect which is due to the dead, who must be allowed to rest in peace, might justly and deservedly be qualified as a defamatory, false, and slanderous libel ; the original of which was forwarded to Father Antonio himself by the said General of the Capuchins, whom the author of said libellous writing had requested to order Father Antonio out of his office, and retire to the convent to which he belonged in Spain. That until his death, which took place on the nineteenth of January, one thousand eight hundred and twenty-seven, the said Father Antonio continued in full and entire possession of his office of curate, without ever being therein disturbed by the bishops whom it pleased the court of Rome to send to New Orleans. That at the death of the reverend and justly to be regretted Father Antonio, Mr. Rosati, bishop of the diocese, nominated by the Pope, then exercised his episcopal functions in New Orleans ; that at the same time, Abbé Moni, who was one of the vicars of the parochial and cathedral church of St. Louis under Father Antonio, united the unanimous suffrages of the Catholics of New Orleans and was loudly and publicly proclaimed by all as the priest who enjoyed their utmost confidence, and as the worthiest, if not the only one worthy to succeed Father Antonio as curate of the said church.

“That in consequence of this manifestation of the popular will, and no doubt actuated by the praiseworthy intention of acceding to the wishes of the Catholics, the said Bishop Rosati informed the wardens of the church of St. Louis, then in office, that he had elected or nominated Abbé Moni as curate to be the successor of Father Antoine ; and that said nomination, however irregular under the existing laws, was approved by the said wardens in terms which clearly evinced the perfect understanding and good feeling then existing between the wardens and the bishop. That Abbé Moni remained in possession of his office of curate and discharged the duties of said office, until the day when he was compelled to relinquish the exercise of his functions by the disease which caused his death ; and that, at his request, Mr. Antoine Blanc, then and at the present time, bishop, nominated by the Pope, did designate another priest (Abbé Andeige) to fill

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the office of Abbé Moni temporarily. That prior to that time, and consequently at the death of Abbé Moni, all the bishops who successively exercised their ministerial functions in this country, from the year eighteen hundred and twenty-six, without excepting Bishop Blanc, have received a salary from the wardens of the church of St. Louis paid to them out of the revenues of said church; but that in January eighteen hundred and forty-two, the said Bishop Blanc being no longer satisfied with that salary, demanded, through the medium of a letter addressed to petitioners, the revival in his favor of a certain right known under the denomination of *Cuarta Episcopal*, that is to say, he demanded that one-fourth of the perquisites (casual) of the said church should be allowed him, over and above his salary.

"That petitioners thinking they were not authorized to grant that demand did not accede thereto, and that they subsequently suppressed the said salary under the conviction that, in allowing the same the wardens had overstepped their powers; and because inasmuch as Bishop Blanc never preached, although the canons and laws of the church made it his duty to preach, he did not render to the church of St. Louis services equivalent to the said salary.

"That, at the death of Abbé Moni, the office of curate of the church of St. Louis having become vacant, Bishop Antoine Blanc, setting up again the pretensions of Abbés Walsh and Olivier, which should not be countenanced inasmuch as the question had already been decided by a judgment, took upon himself, by virtue of his episcopal authority, to confer, *pleno jure*, and without consulting the wardens, the office of curate of the said church of St. Louis on a certain Abbé Roussilon, his personal friend—a foreigner, a priest unknown to the wardens, and who had no claim to their confidence; that for that reason, and because they could not recognize in the bishop the right of nomination, the right of patronage which is inherent to the property, they, the wardens, rejected said nomination.

"That said rejection was immediately followed by the publication of a pastoral letter of the said bishop, menacing the wardens of said church with ecclesiastical censure and penalties, and hinting at excommunication for being schismatic, if they persisted in

their resistance to his episcopal authority. That notwithstanding the aforesaid pastoral letter, the wardens being satisfied that, according to the constitution and laws of this State applicable to the subjects in controversy, as well as according to the laws of France and Spain, which have not been abrogated and are yet in force, they could not surrender one of their most important privileges and franchises to an authority which, except in matters of dogma and faith, is not recognized in this State, and emanates from a foreign power, refused to submit themselves to the arbitrary pretensions of said bishop.

"That in this situation of affairs, wishing to avoid as much as possible the continuation of the conflict of pretensions at war with the peace of the church, the wardens consented to accept as their curate another priest, known by the name of Maenhaut, who was designated by the bishop; but that in consequence of the arrogation of certain pretended rights on the part of said Maenhaut, and which your petitioners could not admit, the said Maenhaut abandoned his functions of curate and withdrew to the bishopric (*à l'évêché*.) That the said bishop encouraged the said Maenhaut in the steps aforesaid, and had no doubt advised, and at all events approved, the assumption of the powers which were contested on the part of said wardens; that afterwards all the priests attached to the church of St. Louis were by the authority of said bishop withdrawn from said church, whereby said church was deprived from the second of November, eighteen hundred and forty-two, of all religious service, and your petitioners were disabled from discharging the duties imposed upon them by their office, to the great scandal of the public, and to the detriment and damage of said church, and of your petitioners.

"That afterwards the true Catholics of this city having met with a view to put an end to the troubles which agitated the public mind, and to effect a good understanding between the bishop and the church wardens, a committee composed of fathers of families and other good Catholics, was appointed by said meeting for the purpose of conferring with the respective parties, to obtain from them mutual concessions, by means of which it was hoped that peace would be re-established. That the result of

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said measures was an agreement by which the bishop renounced his arbitrary pretensions, and consented to nominate a curate subject to the approval or disapproval of the wardens. That in consequence of said understanding, the bishop presented the Abbé Roussilon, who was rejected by the wardens. That shortly afterwards, and in virtue of the same agreement, the bishop nominated another priest, known by the name of Bach, whose nomination was approved by the wardens on the twelfth of January, eighteen hundred and forty-three. That said priest Bach took possession of his office of curate, to which however the wardens would not have consented, if they had anticipated that it was his intention to dictate to them other and new conditions, as he afterwards attempted to do, such as to give to the bishop the power of approval or rejection of the tariff—the resolution or deliberation of the wardens fixing salaries or perquisites of the priests employed in said church. That said pretensions on the part of said Bach having been rejected by said wardens, said priest continued in possession of his said office until he died, on the nineteenth day of September last.

“That when said curate Bach died, Bishop Blanc was absent from New Orleans; that the other priests attached to the church of St. Louis remained in the discharge of their functions until they were all, with the exception of one, withdrawn from said church by the bishop, in execution of the unlimited powers which he arrogated to himself; and for the purpose of compelling your petitioners to an absolute surrender of their rights, franchises, powers and prerogatives, as Catholics, and as free citizens of the United States, who can recognize no other sovereignty, except in matters of religious dogma, than that of the government under which they live. That on the return of said bishop to New Orleans, and as soon as he was informed of the death of the curate Bach, he stated in a letter written to your petitioners, that it became his duty to consider and select from among his priests, the one best calculated to fill the vacancy occasioned by the death of the venerable curate Bach; that said letter is dated on the tenth of October, eighteen hundred and forty-three, in which he likewise states to your petitioners: ‘One consideration has prevented me until now, from stating to you

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the choice which I have made, and in order to obviate the same troubles which during fifteen months afflicted the Catholic community, and which must have been as painful to you as they were to me, I have thought that it was necessary to determine in a precise manner what will be the condition of the priest whom I shall place, or appoint, as curate of the cathedral. This, it appears to me, is the only means of putting an end to all difficulties. In order that a priest should exercise his functions of curate of the cathedral with dignity and propriety, it is necessary that he should have in his power the records for which he is responsible both to families and to his bishop; that he should have the control and choice of the officers and assistants in the interior of the church, so that he may exercise his ministry without hindrance; that the free use of the presbytery should be secured to him in such a manner as to be master in his own house; and finally, that the tariff or fee bill which is to be followed by the clergy should be subject to the approbation of the episcopal authority.' The bishop concludes his letter in the following words: 'These propositions being made for the sole purpose to put an end to all difficulties, I think that you will at once accede to them. As soon as your acquiescence is communicated to me, I will at once inform you of the choice which I have made. I have the honor to be, &c.'

"Your petitioners further represent, that they could not but be surprised at the extraordinary conditions which the bishop attempted to dictate to them, and which he required them to accept, in order to obtain the nomination of a successor to the curate Bach, whose death had deprived the church of St. Louis of its pastor. But such was the extraordinary character of said conditions, that they were compelled to withhold their assent thereto. Resolutions to which effect being passed were communicated to the bishop. That they could not accede to the pretensions set up by the bishop, without transcending the powers delegated to them by the charter under which they act. That it is erroneous to say that the records of the church are in the exclusive custody of the curate, and that he is responsible for them as such to the families and to the bishop. That if by the register, the bishop means or understands the register of baptisms and marriages,

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these documents, whilst they contain proof of the administration of sacraments in virtue of the laws of the church, are at the same time the proofs and title of the civil condition of the Catholic citizens, by means of which their filiation, their paternity, their legitimacy or illegitimacy is to be established; and to confide such records to the exclusive custody of the curate would be to constitute him a public officer, which cannot be done except by that branch of the government in which such powers are vested.

"That as regards the register of baptism and marriage, as they are considered under the laws of this State, the bishop, not being a competent judge of the question of legitimacy, filiation or paternity, nor of the validity of marriages, cannot pretend that the curate is responsible in any manner towards him in relation to said register.

"That as regards the lodgings of the curate, although the act of incorporation does not impose on the petitioners the obligation to furnish them, there has never been any objection on their part that he should be accommodated with a proper set of rooms in the same manner as his predecessor, and with which all his predecessors have been perfectly satisfied.

"That with regard to the right claimed for the curate to have the choice and control of the officers and other persons employed in the church, your petitioners would have had no objection thereto, if the curate appointed or to be appointed was only to be subject to the spiritual jurisdiction of the bishop, and independent of him in all other respects; but that your petitioners are fully authorized to conclude from the acts and doings of said bishop, that it is his intention to make the curate a mere tool of his own, subject to his orders in all matters whatever, whereby he intends to make himself the absolute master of the church of St. Louis. For which reason, your petitioners have been compelled to withhold their assent to the conditions attempted to be imposed.

"That in relation to the tariff, the conditions of the bishop are entirely inadmissible; that by the sixteenth section of the charter above referred to, full power is vested in the petitioners to fix the emolument of the curate as well as of other priests, and to determine the perquisites to which they shall be entitled. And your

petitioners aver, that the authority now claimed by the bishop to exercise the veto power over the acts of your petitioners with respect to this matter, is not sanctioned by any law. That the attempt of the bishop to impose such a singular condition is in reality only a second effort to obtain the *Cuarta Episcopal*, which he had already in vain attempted to obtain before.

"Your petitioners further represent, that after said bishop had been notified that his propositions had been rejected, he addressed them a letter, dated the twenty-second of October last, in which he states, that if they persist in said resolution, all connection between him and them shall cease, by which he clearly intimates that unless his extravagant pretensions are recognized by your petitioners, no curate shall be appointed for the church of St. Louis. That in the letter last referred to, the said bishop endeavors to justify his various pretensions by an elaborate discussion, and with a view to induce the wardens to accede to his demands, and concludes by notifying to them that he will always assert the exclusive right and privilege of appointing all curates and other ecclesiastical dignitaries, which he pretends is guaranteed to bishops by what he calls the common ecclesiastical law, which common law is nothing else than what the European canonists, jurists and bishops have always denominated the *ultra montane law*, or otherwise the purely Papal law, which has never been in force either in Spain or in France, nor in the American colonies, and has at no period been in force in this State; but has, on the contrary, always been resisted and repudiated by the prelates and dignitaries of the church in those countries where an attempt has been made to introduce it. That, on the first of November instant, the wardens informed the bishop, through their president, that they could not acknowledge his unfounded and preposterous pretensions; informing him at the same time that, in the exercise of their right of presentation, (*droit de patronage*,) resulting from the Spanish ecclesiastical laws, which are still in force in Louisiana so far as not inconsistent with the positive constitutional and statutory laws of the State, as well as from the acts of incorporation, they have nominated a priest to the curacy of the church of St. Louis: that on the third of the same month the said bishop addressed a letter to the president of said wardens, in

which he declares, that he cannot, and will not acknowledge the right of said wardens to make said nomination, relying on a brief or rescript of Pope Leo XII., as evidence of his own right and as the only guide to be followed by him as bishop, and stating that he should consider as schismatic any priest who should exercise his functions in the said church under said appointment, which he pretends is radically null; and alleging that it is impossible for him to approve said nomination, which he calls an act of schism on the part of said wardens, and apprising them that henceforward the priests officiating in said church, as well as those attached to the obituary chapel, shall cease to be in the pay of your petitioners; and concluding by accusing them of endeavoring to destroy the unity of the Catholic Church, and stating at the same time, that he reserves to himself the right of withdrawing, employing, and changing the priests appointed by him to officiate in the church of St. Louis, according to his own will and pleasure.

“And your petitioners further represent, that the language thus used by the bishop is indicative of an intention on his part to secure to himself a despotic and absolute authority, under the specious pretext of serving the interests of religion, and by that means to extend the secular influence of the court of Rome over this republic, in violation of all our laws and usages, and in violation of our religious liberty, and to make the *dicta* of the court of Rome, even in temporal matters, paramount to the constitution and laws of this State.

“That fully convinced of the inevitable tendency of the pretensions of said bishop, and being unable without being guilty of a dereliction of duty as Christians and as freemen, and without violating the principles of the federal and state constitutions, to recognize and admit said exorbitant pretensions, they have always deplored, and still sincerely deplore the inconceivable and blind obstinacy with which said bishop persists to uphold said pretensions, and especially the violent and unchristian temper which he displays in denouncing your petitioners and their acts as schismatic, when in reality they have done nothing more than exercise their unquestionable right of presentation (*droit de patronage*,) which right consists simply in presenting to him a

Catholic priest to fulfil the functions of curate of the church of St. Louis, leaving him at the same time his episcopal right to reject said presentation, if the nominee do not possess the qualifications required to receive from him, the bishop, the canonical institution, without which the wardens acknowledge that such priest could not be admitted to exercise his functions in said church.

"Your petitioners further represent, that they are proprietors of the said church of St. Louis, and have acquired the ownership thereof by uninterrupted possession for more than thirty years; that they and their predecessors ever since the year eighteen hundred and five, have been in possession as owners of said church and of the other property appertaining thereto; by which possession they are entitled to claim said church and property by the prescription of thirty years.

"That, in their capacity of owners, your petitioners and their predecessors have administered the temporal affairs of said church and with the revenues thereof, which in the beginning were very inconsiderable, they have kept all the buildings in a proper state of repair, built the principal steeple of the church, and constructed the gallery known as the tribune. That when, in eighteen hundred and five, the first church wardens elected by the Catholics, took possession of the property and commenced the administration of the affairs of said church of St. Louis, the real estate belonging to it consisted in a space of ground situated on the left side of said church, and comprised between Chartres, St. Anne, Royal, and the continuation of Orleans street; that said space of ground was at that time covered with small buildings of brick and wood of little or no value, and yielding but a small revenue; that the large building which is in part opposite the *Place d'Armes*, had only been commenced, and in the imperfect condition in which it then was, being only raised to the first arches, was used by being temporarily covered with boards by the person to whom it had been rented, and produced only a small annual rent. That your petitioners and their predecessors have caused to be constructed on the whole of said space of ground, all the brick buildings several stories high with which it is now covered, fronting on St. Anne and Royal streets and on the place

called St. Antoine ; that the presbytery fronting on St. Antoine Place has likewise been built by your petitioners ; that before this last mentioned house was erected, and up to the time of the death of the reverend Father Antonio de Sedella, there was nothing but a small frame house in which this worthy pastor resided, and he was the only priest attached to said church who was lodged at the expense of the church. That the large building referred to, fronting on the Place d' Armes, has been finished and completed by your petitioners according to its original plan, and distributed in such a manner as to be conveniently occupied at first by private individuals, and afterwards by some of the courts of justice in this city. That when the public desired that all the courts sitting in New Orleans should be held in the same building, your petitioners, both with a view to conform to the public exigency, and to derive a certain annual revenue from said property, caused important additions and alterations to be made to and in said building, so as to afford convenient halls for the sessions of different courts, and for the clerks and sheriffs thereof.

" That the cemetery which was used by the said church being too small, and the police ordinances no longer permitting that interments should be made therein, your petitioners purchased for the use of said church, a large extent of ground to be used as a Catholic church-yard, not far distant from Rampart street, which cemetery is still used for the purposes aforesaid. That your petitioners did also purchase, for the use of the Catholics belonging to said corporation, a lot of ground situated on Rampart street, on which they have erected a small chapel or church called the Obituary Chapel, and also a convenient dwelling house for the priests officiating in said chapel.

" Your petitioners further represent, that notwithstanding all the foregoing facts and acts of proprietors and patrons, and in opposition to the laws of this State, and with the sole view to supersede said laws by the rules of discipline of the Roman church called the common *ultra montane* law, the Bishop Antoine Blanc contests the right of your petitioners to do or perform any act either as patrons vested with the right of presentation, or otherwise, in the nomination of the priests charged with the performance of religious service in the church of St. Louis, as well as in the said obituary chapel. That by his conduct, and the influence which

his station gives him over the minds of a large number of persons incapable of drawing a clear distinction between the cause of religion and its ministers, and between that which belongs to the dogma or faith of the Catholic religion, and those laws which only regulate its discipline, the bishop has caused a deplorable division of opinion among the Catholic population of this city, although it was his bounden duty to use every effort in his power to preserve harmony, good feeling, benevolence and charity.

"That said division has reached to such a point, that recently a certain number of persons calling themselves the representatives of the Temperance Society, generally unknown to your petitioners, but probably Catholics, have published a vote of censure or disapprobation, conceived in harsh and insulting language, of the conduct and pretensions of your petitioners, and, at the same time, approving the conduct and pretensions of the bishop, declaring that they recognized them as just and legitimate, and offering their aid and assistance to maintain him (the bishop) in the exercise of his said pretensions.

"That to the great regret of your petitioners, the said bishop has addressed a letter to the representatives of said Temperance Society, published in one of the newspapers of this city, in which letter said bishop, without regard to the consequences which might flow from such a step, approves of the sentiments expressed by those individuals, and offers them his thanks. That said bishop, relying on the proffered support of said society, and regardless of the evils which may be occasioned by exciting a degree of exasperation and discontent which may become fatal to the public peace, has finally withdrawn from the church of St. Louis, all the ministers of the Gospel attached to said church since the death of the late curate, with the exception of Father Assencio, whose exertions, notwithstanding all his zeal and learning, are inadequate to the spiritual wants of the Catholics of the church of St. Louis, which consequently is deserted.

"Finally, your petitioners represent, that by reason and in consequence of the inadmissible pretensions of the said Bishop Blanc, as well as by his refusal either to recognize the right of nomination or presentation of your petitioners, or to exercise said right

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of nomination himself, subject to the approbation of your petitioners, as it has been done during the time of Bishop Rosati, in pursuance of the compromise or agreement made between said bishop and a committee of Catholics referred to above, and also by the withdrawal of all the priests from said church except one, your petitioners have suffered and sustained and are suffering and sustaining damage to a large amount, which damage has increased by the effect of the libellous and defamatory letter which the bishop has written and published as aforesaid, in which he stigmatizes their acts as schismatic, and as tending to destroy the unity of the Catholic Church, all of which is false, injurious and calumnious; that said damages amount to at least twenty thousand dollars.

"Your petitioners allege, that it was the duty of the bishop, living under the protection of the laws in force in this State, to submit himself to those laws, either as an alien, if he is not a citizen of the United States, or as an American citizen, if he has been naturalized and taken the oath of allegiance; inasmuch, first, as the right of presentation or election, in virtue of which priests are appointed for the service of the church, only appertains to the discipline, and has no reference either to the sacred dogmas or to the articles of faith of the Catholic religion: second, as in matters of patronage or election, each Catholic state or government has, and may have, its own laws different from those of the court of Rome, and that, without in the least encroaching on the spiritual jurisdiction of the Pope: third, as, if the said bishop is a naturalized citizen of the United States, he could not, without violating his oath of allegiance, invoke as the only rule of his conduct, either a bull or a brief, or any other sort of law or decree emanating from the Holy Catholic See, in matters relative to discipline or temporal affairs, or in any matter not purely spiritual; especially, when such a course of conduct, or the acts resulting therefrom, affect the rights, prerogatives, franchises, and liberty of his fellow citizens.

"Your petitioners therefore pray, that the said Antoine Blanc, bishop, residing in the city of New Orleans, within the jurisdiction of this honorable court, be cited to appear and answer this petition; that after due proceedings had, judgment be rendered

in favor of your petitioners against the defendant for the aforesaid sum of twenty thousand dollars, as damages by them sustained, with interest and costs of suit. And your petitioners further pray, that it may please the court to order and decree in their favor, such other remedy and relief as the nature of their cause and the particular circumstances of the case may require and as the law will permit; and as in duty bound, they will ever pray, &c."

The defendant excepted to the petition, alleging: "That by law, and by the charter of the corporation, it is an aggregate one, composed of two distinct and integral parts, to wit, of one clerical or ecclesiastical member, and of twelve lay members. That the curate of the church of St. Louis is, by virtue of his office of curate, a distinct, clerical and integral part of said corporation, and without whose existence, presence, assent and assistance, the said corporation is incomplete, and incapable of exercising its corporate functions, or of instituting or prosecuting this action, or of standing in judgment therein. That it appears from the petition, that the office of curate of said church is now, and was at the time this suit was instituted, virtually vacant, or in abeyance, and that no person was then, or is now in existence, or recognized by the lay members of said corporation, as lawfully holding that office, and capable of deliberating upon, or assenting to, the acts of the lay members of the corporation. That this action was commenced, and is prosecuted by said lay members alone, without the participation, knowledge, or concurrence of the clerical member of said corporation, and without his having had the means of joining in the deliberations thereon, or of expressing his assent or dissent, by vote or otherwise.

"That, by the charter of the corporation, the powers and duties of the plaintiffs are restricted to the administration of the property and revenues of the said church of St. Louis, which is a local, special, and particular church; and that no power is given to them to regulate, or in any manner interfere with, the doctrine, discipline, or government of the Catholic Church, in its general or universal character as a church. That it is not alleged in the petition, that this action is founded on, or that the damages claimed therein arise from, any injury to, or detention of, the

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property, moneys, or other things belonging to the temporalities of the church, by law confided to the administration of the plaintiffs, or placed in their possession, or under their control.

"That no cause of action is set forth in the petition which can entitle the plaintiffs to recover of the defendant any actual damages in money; the cause of action therein set forth being founded on the alleged opinions of the defendant, in relation to the government and discipline of the Catholic Church within the diocese of Louisiana, of which diocese the defendant is the lawfully constituted bishop, and which he submits is not a cause for damages, or for any action at law, or for which the plaintiffs are entitled to any satisfaction in money.

"Finally, that the petition sets forth no cause of action, of which the court can, or ought, to take cognizance." Wherefore the defendant prays that the petition may be dismissed.

The judge of the Parish Court sustained the exceptions, and dismissed the petition, being of opinion, that the curate forms a separate and integral portion of the corporation, and that, during a vacancy in that office, the corporation cannot act. He also sustained the exceptions on the ground, that no action for damages, founded on the refusal of the bishop to give his ecclesiastical sanction to the nomination of a curate made by the wardens, or to nominate one himself, could be maintained, it being, in fact, an action against the bishop to recover damages for his disagreement with the wardens, in regard to a matter of doctrine or church discipline. The plaintiffs appealed.

Soulé, for the appellants. This case comes up on exceptions which embrace all its merits. All matters of fact and allegations in the plaintiff's petition must be taken for granted. The only question for this court will be whether from the nature of the case which the plaintiffs exhibit, and from the capacity they have assumed, the present suit can be maintained.

The defendant contends, that the corporation created by the act of 1816, being composed of a curate and of six lay members, who were afterwards increased to twelve, consists of two distinct and integral parts, which cannot cease to co-exist, without an actual dissolution of the whole; and he insists that the office of curate being actually vacant, the corporation has virtually ceased to exist, and that therefore the present plaintiffs are incapable of suing in its name and behalf.

Is then the corporation of the church of St. Louis actually composed of two distinct and integral parts? Is the curate any thing but a warden? Does he possess any privilege which contradistinguishes him from the other wardens; or is he vested with any separate power, authority, or control, which at all support the character claimed for him by the defendant, of constituting alone, such a distinct, integral, and so important a portion of the corporate body, as to annihilate it, the moment he ceases to act his part? The proposition is preposterous.

It is said, that the act of incorporation which provides for the election of the lay members, has no provision for the appointment of the curate; that his nomination remains independent of the powers conferred by the Legislature, &c., &c. Is that any proof that the curate constitutes a distinct and integral part of the corporation? The law says, on the contrary, that he shall, with the other members, (the lay members,) form a body politic, styled *the Wardens of the church of St. Louis of New Orleans*. (Moreau's Digest, vol. 1, p. 200, § 1.) Thus he is made a warden, and is in all respects assimilated to the other wardens, being in no manner contradistinguished from them, except so far as he takes his seat by virtue of his office, and is not, like the others, submitted to the ordeal of an election.

If he were intended to constitute by himself a distinct and integral part of the corporation, why is he totally disregarded by the 10th section which provides, that the affairs of the corporation shall be managed by a majority of the wardens? Could that be the case, if he were a distinct and integral part of the corporate body? In what is the curate distinct from the other wardens, when the interest of the corporators are to be administered?

The mayor and aldermen of the city of New Orleans constituted once a corporation composed of distinct and integral parts. But then each of those parts had an independent corporate existence; each moved in its own separate circle, and although they were but the portions of a whole, they were not merged in each other so as to destroy all distinction, and the action of both was necessary for the legal action of the whole. Not so with the present corporation;—it is not styled the *Curate and Wardens*, but *the Wardens of the church of St. Louis, &c., &c.* The action of the two alleged distinct and integral parts, is not required for the legal action of the whole. On the contrary the management of the common affairs is left with the majority of the wardens, and the acts of the majority are, to all intents and purposes, the acts of the whole corporation.

The wardens of the church of St. Louis constitute, and are in fact an aggregate corporation, but not a corporation composed of integral and distinct parts.

We are next to consider, whether the powers assumed by the wardens are such as are given to them by the act of incorporation. The defendant alleges, *that being instituted only to administer the temporal concerns of the church, the wardens cannot exercise any control over its doctrine, discipline or government, or its general or universal character as a church.*

It is conceded, that the wardens are exclusively vested with the power necessary to administer and govern the temporalities of the church ; but they are denied all kind of control beyond the actual disposition of the revenues of the *fabrique*. They are vested by the 10th section of the act of incorporation, with full and ample authority *to provide in a suitable manner, for public worship* ; and this not only includes the right, but imposes the obligation, to secure a priest to be the curate of the church.

Many ceremonies of the Catholic religion cannot be accomplished without a curate ; and the power to provide for public worship would become nugatory, without a power to procure the proper minister who could perform it. Can it be said, that at the same time the wardens are to provide for public worship in a suitable manner, they shall be precluded from all authority to procure the very officer without whom the worship is impossible ; or does the act of incorporation intend, that the nomination of such an officer should be left at the mercy of an authority, which could put its provisions at defiance ? Clearly not.

The appointment of a curate was at all times, a temporal concern too intimately connected with the well being, peace and harmony of the Catholic fraternity, to be effected without their will, choice or assent. The moral and intellectual qualifications of the clerical officer to be appointed, the orthodoxy of his creed and doctrine, those theological endowments which might recommend him as a proper minister in whom confidence could be placed, and on whom the sacred orders might be safely conferred, may well be claimed as falling within the spiritual authority of bishops, archbishops or popes, without impairing in any manner the right of the Catholic body to choose their pastors ; just as with us, although the power to grant a lawyer his license be with your Honors, the right of selecting him as advocate in a cause, remains with the client. The office of curate is a benefit, (*beneficium*,) derived not from the heads of the church, who have only to decide on the canonical qualifications of the priest appointed, but from the individuals or corporations who provide for his maintenance and pay. By the canon laws, the presentation of the curate must come from the patron, (*a patrono*,) while the bishop only institutes him ; and thus is left to those who confer the benefit, and provide for its maintenance, the natural right of select-

ing the beneficiary. The donor is permitted to choose the donee; on the other hand, the spiritual privileges are respected, by leaving with those who are entitled to claim the same, full liberty to exercise them according to the mandate of the church and to the dictates of their consciences. The bishop is bound to approve the selection, unless good cause be by him shown to the contrary.

It is alleged on behalf of the defendant, that the matters in litigation, being in their nature spiritual, cannot become the subject of a suit for damages.

The constitution of the United States is invoked in support of the position assumed in this exception; and the authority of our most celebrated judges and jurists quoted to maintain what is by no means denied, viz: that the defendant has an indisputable right to follow, as to his understanding and conscience may seem best, the tenets of the religion which he professes, and that such right cannot be abridged by legislation nor by the interposition of the judiciary.

What do the plaintiffs complain of? Not of any heterodox doctrine which the bishop may entertain and profess, nor of the manner in which he may be pleased to follow the tenets of his creed, nor of any rules which he may choose to impose on those who are under his spiritual authority, nor of his refusing the holy sacraments to the upright and virtuous, nor of his awarding them to the profligate and corrupted These indeed are admitted to be matters between his conscience and his God.

But the plaintiffs complain of his dereliction of duty towards the corporation they represent—of his non-compliance with the obligations which he contracted when he consented to become their bishop, and whereby he was bound, amongst other things, to grant his institution to the curate presented, unless there should be some obstacle,—*modo nihil obstat*. They assert and maintain that, being vested with the right of patronage, which is a real one, belonging to those who build a church, and inherent to the right of ownership, they are by law entitled to be protected in its exercise. That it is a civil right—*verum in jure civili jus patronatus*, (Devoti, vol. 1, p. 242,) and that it can be enforced by the civil tribunals.

Our religious rights are a sacred property, in the enjoyment of which we are to be protected; and if so, who will deny that damages may be recovered, *for the breach of contract having for its object the gratification of an intellectual enjoyment, whether in religion, morality, &c.* Civil Code, art. 1928, No. 3.

That religious rights and privileges, immunities, franchises, discipline and government can be the objects of civil legislation, is taught by all constitutional writers. That the power to legis-

late on that subject, which was denied to the general government, has been retained by the States, is not a question. Story on the Const. vol. 3, pages 722, 723, 730, 731.

Is not a contract between the bishop and the congregation of those on whom he undertakes to exercise his authority, as binding as that of a client with his lawyer, as that of a patient with his physician, as that of a parent with the director of a college or the rector of an academy?

The facts and asseverations in the petition are to be taken for granted. The plaintiffs assume, that the Rev. A. Blanc, in assenting to become bishop of New Orleans, undertook towards the Catholic congregation certain obligations, which constitute his part of the contract entered into with them. That on their side, they assumed to do and perform certain things, and to accomplish certain obligations, which they have done, performed and accomplished;—but that the bishop has not only failed to do what he was bound to do, but actually impedes them in the gratification of their dearest intellectual enjoyment, to wit, that of having the ceremonies of their religion and public worship performed; in consequence of all which, they suffer damages to the amount claimed.

But the defendant insists, that this is not a question of which the civil tribunals can take cognizance. It must be admitted, that wherever there is a contract, there are obligations created, the non-performance of which gives necessarily rise to the adverse right of claiming indemnification therefor. That it was in the contemplation of the authors of our Code to apply those principles to cases like the present one, cannot be seriously contested. Art. 1928, § 3, of the Civil Code, provides, that where the *contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach. A contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.*

The duty of the bishop to institute the curate appointed is asserted by the plaintiffs: the assertion remains uncontradicted, and under the pleadings must be taken for granted.

If the bishop be bound to discharge this duty, and we have succeeded in showing that it was an obligation contemplated by the law, then the exception is disposed of.

That the civil tribunals of Europe, at a time when there was no legislation on the subject, asserted their authority to meddle with such matters, as far as they affected individual rights, can easily be shown. "*Richer*," says Dénisart, vol. 1, p. 73, "*cite une*

multitude d'actes émanés des cours de justice en France, sous les rois de la troisième race, pour repousser les entreprises des ecclésiastiques et leurs vexations. Il rapporte entr'autres un arrêt qui condamna l'évêque de Meaux à exhumer et mettre en terre sainte un certain Poncet, que son official avait excommunié pendant procès, au prejudice de défenses existantes, et qui comme excommunié avait été inhumé en terre profane."

I have hown from Johannes Devoti, that the right of patronage was a civil one. *Verum in jure civili jus patronatus*. Vol. 1, 392. Fevret, in his treatise, *ex professo*, on the subject of abuses (*abus*), shows most conclusively, that the appointment of the curate is a civil right on the part of those who appoint, and his institution a civil obligation on the part of the bishop approving the nomination. Fevret, book 1st, chap. 3, pages 22, 23, No. 3.

The question before the court is purely civil; it originates in the non-compliance, on the part of the defendant, with a solemn contract, and in a breach of obligations intended to secure to the plaintiffs the *gratification of a religious enjoyment*.

Canon, on the same side, cited the act of 7 March, 1816, incorporating the plaintiffs, ss. 1, 2, 3, 9, 10, 15, 16; and the amendatory acts of 22 March, 1822, 6 March, 1830, and 11th March, 1837. Vattel, *Droit des Gens*, lib. 1, ch. 10, Nos. 127, 129, 139 to 146, 150, 151. St. Louis' Pragmatic Sanction, art. 2. (Paillet, *Droit Public Français*, p. 74.) Nov. Recopilacion, ley 6, tit. 17, lib. 1, vol. 1. Ley 1, tit. 18, p. 135. Merlin, *verbis*, Patronage, Bulle.

Roselius and *Mazureau*, on the same side.

St. Paul, for the defendant. The wardens cannot sue, because of the absence of an integral part of the corporation. Angell & Ames on Corp. 58. Black. Comm. book 1, 478, 488, n. 22. Rolle's Abridgment, *verbo*, Corporation. The act of 7 March, 1816, s. 1, shows that the curate is an integral part of the corporation. The powers of the wardens of the church of St. Louis are temporal only. See act of 1816, ss. 10, 11, 15, 16. The right of patronage is a spiritual one. Hericourt, *Lois Ecclésiastiques*, book 1, pp. 259, 275, 278, 203, 217. *Journal du Palais*, vol. 4, pp. 408, 430. Courts of justice have no power to enforce ecclesiastical discipline. See *Martin's case*, 4 Robinson, 62.

D. Seghers, on the same side. On the 13th July, 1787, Congress passed an ordinance for the government of the territory of the United States north-west of the river Ohio. This ordinance contains the following emphatic and solemn declaration: "And for extending the fundamental principles of civil and religious liberty, which form the basis whereupon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said terri-

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tory; to provide also for the establishment of states and permanent governments therein, and for their admission to a share in the federal councils, on an equal footing with the original states, at as early periods, as may be consistent with the general interest:

"It is hereby ordained and declared by the authority aforesaid, that the following articles shall be considered as articles of compact between the original states, and the people and states in the said territory, and forever remain unalterable, unless by common consent to wit:

"Art. 1st.—No person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments in the said territory."

"Art. 5th.—There shall be formed in the said territory not less than three nor more than five states, &c.—And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states in all respects whatever; and shall be at liberty to form a permanent constitution and state government; *provided the constitution and government so to be formed shall be republican, and in conformity to the principles contained in these articles.*"

The act of Congress, approved 26th March, 1804, for erecting Louisiana into two territories, and providing for the temporary government thereof, after having constituted the territory of Orleans, and vested the legislative power in the governor and legislative council, says, (sec. 4.) that, "their legislative powers shall also extend to all the rightful subjects of legislation; but no law shall be valid which is inconsistent with the constitution and laws of the United States, or which shall lay any person under restraint, burthen, or disability, on account of his religious opinions, professions, or worship, in all which he shall be free to maintain his own, and not be burthened for those of another." Sec. 11. "The laws in force in the said territory, at the commencement of this act, and *not inconsistent with the provisions thereof*, shall continue in force, until altered, modified, or repealed, by the legislature."

Another act of Congress, approved March 2d, 1805, entitled "*An act further providing for the government of the territory of Orleans*," provides, "That the President of the United States is authorized to establish within the territory of Orleans, a government in all respects similar, (except as herein otherwise provided,) to that now existing in the Mississippi territory, &c. And that, from and after the establishment of the said government, the inhabitants of the said territory of Orleans shall be entitled to,

and enjoy all the rights, privileges, and advantages secured by the said ordinance, (of 13th July, 1787,) and now enjoyed by the people of the Mississippi territory."

"The act of Congress, of February 16, 1811, entitled "An act to enable the people of the territory of Orleans to form a constitution and state government, &c.," provides, (sec. 3,) as follows: "Whereupon the said convention shall be authorized to form a constitution and state government for the people of the said territory; *Provided, the constitution to be formed in virtue of the authority herein given, shall be republican, and consistent with the constitution of the United States, that it shall contain the fundamental principles of civil and religious liberty, &c., &c.*"

The 4th section provides, that said state constitution, when framed by the convention, shall be transmitted to Congress for its approbation or disapprobation, &c.

The act of Congress, of April 8th, 1812, entitled "An act for the admission of the State of Louisiana into the Union, and to extend the laws of the United States to the said state," provides, (sec. 1,) "that it shall be taken *as a condition upon which the said state is incorporated in the Union* that" all conditions and terms contained in the third section of the act, the title whereof is herein above recited, (the act approved February 16, 1811,) "*shall be considered, deemed, and taken fundamental conditions and terms, upon which the said state is incorporated in the Union.*"

If the ecclesiastical laws of Spain ever were in force in the province of Louisiana, (which is denied, as they were not promulgated by O'Reilly, nor by any other governor of the colony,) they ceased to exist the very moment the country passed under the sovereignty of the United States, for it would have been impossible to enforce those ecclesiastical laws, in the face of the emphatic and solemn declaration of the fundamental principles of civil and religious liberty, promulgated by Congress on the 13th of July, 1787.

Those fundamental principles of civil and religious liberty form an integral part of the constitution of the State of Louisiana, paramount to any other part thereof; as it is not in the power of the people of this state, nor of its convention, to alter, modify, or repeal them, without the consent of Congress, for they are the "*conditions upon which the state is incorporated in the Union.*"

BULLARD, J. The plaintiffs, suing as the Wardens of the Church of St. Louis of New Orleans, allege in their petition, that the church of St. Louis, belonging to them, was built, finished, and expressly appropriated to the use of the Catho-

lic religion. That it was, with the consent of its founder, and by competent authority, erected into a cathedral, to be the seat of a bishop's ministerial functions. That by the French laws, which were in force until the country was ceded to Spain, the right of patronage was recognized, established, and consecrated as a right inherent in the property, in favor of every person who had built a church at his own expense. That the Spanish laws, which superseded those of France, recognized the principle; and that the same laws, except so far as they are abrogated by the constitution of the United States and the constitution and laws of this State, remained in force until 1823, when such as were *civil laws* were repealed, leaving in full force those parts of the Spanish law known under the name of ecclesiastical laws, which are not repugnant to the constitution and laws, in all matters relating to the temporal administration of the Catholic Church. That the *jus patronatus* in the Spanish colonies in America, was expressly reserved to the King of Spain exclusively. That this right of patronage consisted in the right of the king to nominate and present the archbishops, bishops, and other prelates, to the Bishop of Rome, under the name of the Pope, who approved of the same, unless the nominees had not the qualifications prescribed in the canons, and gave the institution necessary. That the king also nominated and designated to the archbishops or bishops, such priests as he destined to the service of the churches, and those prelates were bound, except for good and legitimate reasons, to grant to such priests the canonical institution, necessary for the functions and powers of their office; and all persons, whether secular or ecclesiastical, were forbidden to exercise this right of patronage or presentation. The plaintiffs further allege, that the Spanish laws, with the exception mentioned by them, have continued in full vigor in Louisiana; and that the effect of the cession to the United States could not be, and has not been, to reserve the right of patronage, which the King of Spain attributed to himself, and still less to transfer it to any public functionary of the United States, or any prince, potentate, or foreign government. That by the laws which existed prior to this royal patronage, the people, the Catholics, and their clergy, had the right of nominating and electing prelates without

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any power on the part of the Bishop of Rome, or his agents, to interfere; and that the right to elect priests destined to the service of the parochial churches belonged to the owners of those churches, and was inherent in the property, and as such transmissible to their heirs or successors. The petitioners then enter into long historical details, showing the practice in New Orleans, which it is useless here to repeat. They allege, that the bishops, including Bishop Blanc, have always received a salary from them, paid out of the revenue of the church; but that in January, 1842, the defendant, being no longer satisfied with that salary, demanded, by letter addressed to them, the revival in his favor of a certain right known under the denomination of *Cuarta Episcopal*, that is to say, that one-fourth of the perquisites (casual) of the said church should be allowed him, over and above his salary. That the petitioners, thinking themselves not authorized to grant this demand, refused to accede to it, and subsequently suppressed the salary, under the conviction that, in allowing it, the wardens had overstepped their authority; and that, as Bishop Blanc never preached, although the canons and laws of the church made it his duty to preach, he did not render the Church of St. Louis services equivalent to the said salary. They next proceed to detail the troubles and disturbances which have occurred between them and the bishop; and allege, that finally the bishop wrote to them, that he was ready to name a curate for the cathedral as soon as it was determined what would be his condition; and saying that, in order that a priest may exercise his functions of curate with dignity and propriety, it was necessary that he should have in his power the records for which he is responsible to families and to his bishop; that he should have the control and choice of the officers and assistants in the interior of the church, so as to exercise his functions without hindrance; that he should have the free use of the presbytery; and finally that the tariff to be followed by the clergy, should be subject to the approval of the bishop. They say they refused to accede to these conditions, and they expose at length their reasons; and allege, that the authority claimed by the bishop is not sanctioned by law. Whereupon they were notified by the bishop, that if they persisted in their resolution, all connection between him and them

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should cease; by which he intimates, that no curate will be appointed for the church of St. Louis; and in his letter he asserts the right to appoint all curates, and other ecclesiastical dignitaries, which he pretends is guarantied to bishops by what he calls the *common ecclesiastical law*, which law is nothing else than what the European canonists, jurists and bishops have always denominated the *ultra-montane law*, or otherwise, the purely Papal law, which has never been in force either in Spain or France, nor in the American colonies. That finally, he had refused to recognize the right of the wardens to make a nomination of curate; and declared, that he would consider as schismatic any priest, who should exercise any functions under such an appointment; and apprising them, that the priests officiating in said church, as well as those attached to the obituary chapel, shall cease to be in the pay of the petitioners, and charging the wardens with an attempt to destroy the unity of the Catholic Church. That he thus evinces an intention to make the *dicta* of the court of Rome, even in temporal matters, paramount to the constitution and laws of this State. They proceed to state, that the bishop, by his conduct and influence, has caused a deplorable division of opinion among the Catholic population of the city. That this dissension has arisen to such a point, that recently a certain number of persons, calling themselves the representatives of the Temperance Society, generally unknown to the petitioners, but *probably Catholics*, published a vote of censure and disapprobation, conceived in harsh terms, of the conduct and pretensions of the petitioners, and approving at the same time the conduct of the bishop, declaring that they recognize his pretensions as just and legitimate, and offering him their aid and assistance to maintain him therein. That the bishop addressed a letter to the representatives of the Temperance Society, which has been published, in which he approves the sentiments expressed by them, and offers them his thanks. That finally, he has withdrawn from the service of the church of St. Louis, all the ministry attached to the same, with the exception of Father Assencio, whose services are inadequate to the spiritual wants of the members of the church. The petition finally resumes, that by reason of the inadmissible pretensions of the bishop, as well as by his refusal to recognize their

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right of nomination or presentation, or to exercise it himself, subject to their approbation, and by the withdrawal of all the priests from the church, except one, they have suffered, and are still suffering damage, which has been increased by the effect of the libellous and defamatory letter aforesaid, in which he stigmatizes their acts as schismatic, and as tending to destroy the unity of the church, all which is false, injurious and calumnious; and they lay their damages at \$20,000, for which they pray judgment.

Thus it appears upon an analysis of this petition, that the wardens of the church of St. Louis sue the bishop of the diocese of Louisiana, for damages, for having at first asked for the *Cuarta Episcopal*, in addition to his salary; for having asserted the propriety of the tariff's being submitted to his approbation; for having asked that the curate to be appointed should have the entire control of the records of marriages, &c., and the appointment of the subordinates who officiate in the church; for having neither admitted the right of the wardens to appoint a curate, nor appointing one himself; for having written a letter to the Temperance Society, thanking them for their sympathy in his cause; and, finally, for having withdrawn from the service of the church all the priests except one, whereby the cathedral is deserted. These damages are sought to be recovered of a prelate of the Roman Catholic Church, for having uttered these expressions of opinion, and avowed these pretensions to authority, and exercised these acts of discipline, in reference to the doctrines and government of the church of which he is a high dignitary, while acting in the discharge of his episcopal functions.

The defendant met this petition by four exceptions; the first of which is, substantially, that the corporation of the wardens of the church of St. Louis is an aggregate corporation, composed of two distinct parts, to wit, the curate of the church, and twelve lay members; and that the office of curate being vacant, as shown by the petition itself, it has not the faculty *standi in judicio*. The second exception is, that the powers and duties of the church wardens are restricted to the administration of the property and revenues of the church of St. Louis, and that no power is given to them to regulate, or in any manner interfere with the

discipline or government of the Catholic Church, in its general or universal character as a church. That it is not alleged that any damage has been sustained by injury done to, or by the detention of any property of the church.

3d and 4th. That no cause of action is set forth in the petition, which can entitle the plaintiffs to recover; any such cause of action as therein set forth being founded on the alleged opinions of the defendant in relation to the government and discipline of the Catholic Church within the diocese of Louisiana, of which he is bishop; and finally, that the petition sets forth no cause of action of which the court ought to take cognizance.

These exceptions were sustained by the Parish Court, and the petition dismissed, and the plaintiffs have appealed.

We are not prepared to concur with the Parish Court in sustaining the first of these exceptions, which denies to the corporation the faculty of suing while the office of curate is vacant. We regard the curate as an *ex officio* member of the board of wardens, having but one vote, like any other member, in its deliberations, as the members of this court are, *ex officio*, trustees of some of the colleges in the State. If every seat here should become vacant, the college corporation would, in our opinion, continue to exist, with all its capacities to contract, to sue, and to be sued. This is more especially the case when the appointment of the *ex officio* member does not depend upon the other members, and no mode is pointed out by the charter for filling the vacancy. The question would be a very different one, if the lay members alone, without consulting the curate, were asking for a modification of the charter, as was the case in Pennsylvania, in relation to St. Mary's Church, which was cited during the argument. The management of the property of the church was confided by the charter jointly to the curate and the lay wardens; and the lay wardens alone, according to that decision, could not be permitted to procure such a modification of the charter as to leave out the curate altogether; but it does not follow that, even if there were a curate, this suit might not be instituted against his will, by a vote of the majority, nor that a mere vacancy in the office would be a good plea in abatement. The board is composed of thirteen members, of whom the curate is one, and, according to the Code,

the act of a majority is the act of the whole. Art. 435. But upon the other exceptions, our opinion is unequivocal and unanimous.

Assuming, then, every statement and allegation in the petition as true, can the plaintiffs maintain this action against the bishop?

The charges against him are, in substance, that he has interfered with and impeded the discharge of duties, and the exercise of powers belonging to the church wardens; that he has asserted pretensions unwarranted by law; that he has withdrawn the officiating ministers from the cathedral, by which means it is nearly deserted; and that he wrote a libellous letter to the members of the Temperance Society.

Our first inquiry necessarily is, what are the corporate powers and duties of the plaintiffs? We can learn them only from their charter, and as defined by law. It is to be remarked, in the first place, that although the curate is one of the wardens, *virtute officii*, yet no provision whatever is made by the charter for supplying a vacancy occasioned by his death, or resignation, or otherwise. The vacancy is supplied as soon as a new curate is appointed and qualified, according to the established doctrine of the Catholic Church; but how, or by whom, we are not judicially informed. Nor is there any general law on this subject; as we shall presently show, that the law cited from the 1st Partida, and the Recopilacion, relative to the right of presentation to a vacant benefice, or the *jus patronatus*, has been abrogated.

The ordinary corporate powers common to most corporations, are conferred by the 2d section of the act of 1816, entitled "An act to incorporate the Congregation of the Roman Catholics of the Church of St. Louis." The 10th section defines the powers and duties of the wardens. They are vested with full authority to provide in a suitable manner for public worship (*entretien du culte*;) for the salaries of the ministers and *employés*; to administer the revenues of the *fabrique*; to keep up, repair and improve the property thereto belonging; and to make and alter any ordinances relative to those objects, and all affairs which concern the temporalities, (*le temporel*;) of the said church. The 16th section authorizes the wardens to fix, on the third Monday in January of each year, the emoluments of the curate and of the other

ministers officiating in the public worship, and of those employed in the service of the corporation, as well as the sums which the curate and other ministers shall have a right to exact under the name of *casuel*; and they are forbidden to receive any higher fees under a penalty of twenty-five dollars.

The title of this act is, "An act to incorporate the Congregation of the Roman Catholics of the Church of St. Louis of New Orleans, and to regulate the administration of the property and revenues of said Church." The corporators, those who have a voice in the election of lay wardens, are declared to be all white persons, aged at least twenty-five years, having resided at least five years within the parish of St. Louis, and paid a state, parish or city tax, and professing the Roman Catholic religion. They are the *constituents*, and the wardens are their *mandataries*, having by law a corporate name and capacity, the more effectually to administer the temporalities of the church, and to provide for the support of public worship in the Catholic form. The charter does not give to the mandataries of the Catholic part of the community a right to appoint, in the theological sense of the word, a *curate*, but only to provide for his salary; and we do not doubt their perfect right to withhold all salary from any person whatever, and even to prevent any person claiming to be curate, to enter the church belonging to the corporation. We expressly so ruled in the case of *The Church of St. Francis of Point Coupée v. Martin*, 4 Robinson, 62, in which case the curate claimed his salary, after he had been notified that it had been stopped and withheld. The Legislature have not, and could not in our opinion, authorize the wardens to interfere in matters of mere church discipline and doctrine. It could not constitutionally declare, what shall constitute a curate in the Catholic acceptance of the word, without interfering in matters of religious faith and worship, and taking a first step towards a church establishment by law. It would have as good a right to provide for the appointment of bishops, for the qualification of circuit riders, presiding elders, deacons, priests who officiate in the Jewish synagogues, and even for the election of the Pope.

The plaintiffs' counsel place their right to recover upon those articles of the Code so often quoted, which declare "that every

act whatever of man, which causes damage to another, obliges him, by whose fault it happened, to repair it," and that "every person is responsible for the damage which he occasions, not merely by his act, but by his negligence, his imprudence, or his want of skill." It is asserted that in consequence of the unfounded pretensions and acts of the bishop, the cathedral has been in a great measure deserted, and the income of the church greatly diminished; and the petitioners thence infer their right to recover damages.

These articles are not to be understood in their literal sense, as applicable indiscriminately to all acts whatever, even to those for which the person committing them is declared by law not responsible—such acts do not violate any legal right, and involve *no dereliction* of legal duty and obligation. Men are liable in damages only for their *illegal* acts, and for injuries done to the legal rights of others; and as this court said, in the case above alluded to, of *The Wardens of Point Coupée v. Martin, Curate*, "courts of justice sit to enforce civil obligations only; they never attempt to coerce the performance of spiritual ones."

But the plaintiffs' counsel contend that the duties of the bishop are legal duties, and it was even asserted by one of them that he might be coerced to discharge them by the arm of the law, and by writ of mandamus. Nothing can be more plain and obvious than the principle laid down in the case above spoken of, "that neither the Pope, nor any bishop has, within this State, any authority, except a spiritual one." 'The highest prelate of the church, in common with the most humble worshipper, cannot be molested on account of his religious opinions, and the free expression of them. If the bishop entertains and expresses the opinion that he *alone*, in his episcopal character, has, according to the established discipline or government of the Catholic Church, a right to appoint a curate, he is not responsible to any man or body of men for expressing such an opinion. If, in the exercise of his spiritual functions, he has caused his subordinates to cease to perform divine service in the cathedral, it is an act for which he is not accountable to any human tribunal. The wardens might as well sue the worshipper himself for ceasing to occupy his accustomed seat in the church, because of a difference of opinion between

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him and them as to the proper qualification of the curate. Admitting that the diffusion of the defendant's opinions has produced, as it is alleged, lamentable dissensions in the community, the plaintiffs were not appointed to maintain unanimity of opinion upon religious topics, much less to invoke the aid of the courts to enforce it.* But it is said, that the bishop, being no longer satisfied with the salary which has been allowed him, asked through the medium of a letter addressed to the wardens, the revival of a certain right, known under the name of *Cuarta Episcopal*, that is to say, that one-fourth of the perquisites, or *casuel*, should be allowed him over and above his salary. It is not even insinuated that he retained, or attempted to retain the slightest part of that income, under such a pretence. On the contrary, his addressing himself to the wardens shows his opinion that they had a right to refuse it. If the Pope were to claim one-fourth of the treasury of the church, he would only be laughed at for his pains. Again, it is said, that the bishop published a pastoral letter menacing the wardens with ecclesiastical censure, and even *hinting at excommunication* for being schismatic, if they persisted in their resistance to his episcopal authority. And suppose he had excommunicated them, could the bishop be punished, or amerced in damages for regarding the wardens as schismatics according to his views of the doctrine and discipline of the church; and a court of justice be gravely called on to decide which was schismatic, the bishop or the wardens? By what standard are we to ascertain the orthodoxy of the corporation, or of the bishop? The whole matter would end in the most gross absurdity, as well as an attempt to violate the most sacred of human rights—an entire exemption from all responsibility on account of religious opinions. The letter to the Temperance Society, said to be libellous, is not alleged to be malicious, and malice is of the essence of slander; and besides, this is perhaps the first time that a corporation has brought an action for slander. It is precisely as if a *bank* were to sue a citizen for damages, for having asserted that its *directors* were rogues and speculators.

We proceed next to show upon what ground this exemption from liability on account of religious opinions reposes, and how far any former law in this State can be invoked to support a con-

trary doctrine, or any right to nominate a curate, as incidental to the ownership of the church.

The argument of the junior counsel of the defendant upon these questions of religious liberty and worship, met our entire approbation. Vatel, whose opinion was quoted by the opposite party, to prove that it is one of the attributes, as well as duties of the sovereign, to make suitable provision for a religious establishment and religious instruction among the people, lays it down as a maxim, that liberty of conscience is a natural and inviolate right; and he adds, it is a disgrace to human nature that a truth of that kind should require to be proved. 1 book, 12 chap.

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All the laws quoted from the Spanish Code, which the counsel for the plaintiff is pleased to denominate *ecclesiastical laws*, have been long since abrogated and repealed. They had reference to an established state religion, which in Spain was exclusive. In this whole Union the separation of church and state is complete, and we trust eternal. How is it in Louisiana?

In the treaty of cession, the First Consul of the French Republic exacted a stipulation in favor of the *inhabitants* of the ceded territory, that they should be incorporated into the Union, and admitted as soon as possible according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and that in the mean time they should be maintained and protected in the free enjoyment of their *liberty, property*, and the *religion* which they profess. This stipulation was personal to every *inhabitant* of the country, in relation to his property, and the religion he might profess. He was solemnly guaranteed the free enjoyment of his religious opinions, whatever they might be. It was not a stipulation in favor of any particular church, or religious establishment; but a full guaranty to every inhabitant of the ceded province, that he should not be molested on account of his religious belief, or form of worship. The States had already, in the Federal Constitution, forbidden Congress from passing any "law concerning an establishment of religion, or prohibiting the free exercise thereof;" and the people of Louisiana were promised a

full participation in the immunities and blessings, which such a provision was calculated to afford.

Among the first acts relating to the government of the ceded territory, Congress passed one, which was approved on the 2d of March, 1805, "further providing for the government of the territory of Orleans," which authorized the President of the United States to establish and organize within that territory, a government, in most cases similar to that existing in the Mississippi territory, and to appoint all officers, &c., "in conformity with the ordinance of Congress made on the 13th of July, 1787;" and the act declares that "from and after the establishment of said government, the inhabitants of the territory of Orleans shall be entitled to enjoy all the rights, privileges, and advantages, secured by said ordinance, and enjoyed by the people of the Mississippi territory."

That remarkable ordinance, which provided for the temporary government of the immense territory north-west of the Ohio, now embracing some of the most powerful and populous States in the Union, contained the following enunciations and provisions: "And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitutions are erected; to fix and establish these principles as the basis of all laws, constitutions, or governments, which forever hereafter shall be formed in said territory; to provide also for the establishment of States, and permanent governments therein, and for their admission into the federal councils on an equal footing with the original States, at as early a period as may be consistent with the general interest; it is hereby ordained and declared, &c., that the following articles shall be considered as *articles of compact* between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit: Article 1st. No person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments in said territory." The people of Louisiana by the act of the then sovereign, became a party to this noble compact; were made to participate in the enjoyment of this entire exemption from control, restraint, or liability in all

matters of religious belief or worship, and became solemnly bound never to permit any enactment by legislative authority, tending to molest any man on account of his mode of worship or his religious sentiments. If the State constitution framed a few years afterwards, contained no such restriction upon the legislative power, it was because it was thought unnecessary. It had already been settled by solemn and inviolable compact, that religious freedom, in its broadest sense, should form the essential "basis of all laws, constitutions and governments," which forever after should be formed in the territory, and that compact was declared to be unalterable, unless by common consent. The act of Congress of 1805 above cited, provided for carrying into effect the stipulations of the treaty, as soon as the population should amount to sixty thousand, by authorizing its admission into the Union, "provided the constitution so to be established shall be republican, and not inconsistent with the ordinance of the late Congress, passed on the 13th July, 1787, so far as the same is made applicable to the territorial government hereby authorized to be established."

It has, we believe, been the uniform opinion of the profession, that these laws of Spain have ceased to exist, by their absolute repugnance to the fundamental principles of our American governments. The translators of the great body of the Spanish laws, called *Las Siete Partidas* from which the counsel for the plaintiffs have quoted so largely, as still in force under the name of ecclesiastical laws, omitted as not in force, the whole of the first Partida, except the two first titles, which treat of laws, justice, customs, &c. They left out twenty-two titles embracing the whole matter of a religious establishment, the Catholic faith, the sacraments, the duties of the clergy, religious orders, vows, excommunication, simony, and sacrilege, advowsons, tithes, &c. &c. In their preface they content themselves with saying, "those parts which relate to the Catholic faith, and to matters of a criminal nature, *having been repealed*, are therefore *entirely omitted*." Nor is this a mere opinion of the translators, themselves learned members of the bar. The work was published by authority, as a translation of so much of the *Partidas* as had the force of law in this State, by virtue of an act of the Legislature passed in March, 1819, by which same act, Peter Derbigny, Stephen Maz-

ureau and Edward Livingston, were appointed to examine the manuscript, and to compare it with the original language, and to see that it was faithfully done, and contained all such laws of the Partidas, as were considered as having the force of laws in this State. It is true their certificate was afterwards dispensed with by an act of 1820; but it is nevertheless true, that the work was published and distributed by legislative authority, thereby clearly indicating the opinion of the Legislature, that such parts as are omitted in the translation are no longer in force. See acts of 1819, p. 44; and Acts of 1820, p. 20.

But if there could be the least possible doubt on this point, it has been removed by the act of 1828, which swept from the temple of the law every such relic of a barbarous age. That act provides, "that all the civil laws which were in force before the promulgation of the Civil Code lately promulgated, be and the same are hereby abrogated," &c. B. & C.'s Digest, 155.

But it is said, that these are not civil but *ecclesiastical* laws; as if the Catholic faith and church were not themselves *civil* institutions in Spain; as if the Partida, so often quoted, did not enact in so many words, *that the very beginning of the laws*, both spiritual and temporal, is faith in one God, in three persons, and in all the dogmas of the church, as matters of *civil* obligation; as if that very law, which regards the right of presentation or advowson, as inherent in the *property of the church*, does not regulate a civil right—a matter of property; as if the ecclesiastical laws of Spain, had survived every other part of its legislation, and we were now sitting as an *ecclesiastical* tribunal, to be guided in our decision by the Codes of the Alfonsos, the Phillips, and the Ferdinands. Such pretensions will not bear a moment's examination. While the laws of the 1st Partida are so confidently relied on by the plaintiffs' counsel, as still in force in all matters relating to the temporal administration of the Catholic Church, especially that which goes to show that the founder and owner had the right of presentation or patronage, it probably escaped his attention that the very next law of the same title, upsets his whole theory, by declaring, that only in the event of the patron being oppressed with poverty, shall the clergy allow him any part of the rents, or revenues, of the very church of which he was the

founder and patron, and then only in common with other *paupers*, though ; in rather a larger proportion thus giving to the *priest* nominated by the patron, the whole *management and control* of the *temporalities* ; provided, however, that the founder might, by previous compact *with the bishop*, reserve to himself a certain portion of the rents.

What part of these laws shall we retain, and what part reject ? Shall we pick to pieces this tissue of enactments of the same age and color and general texture, relating to the same mixed system of civil and religious government in Spain, emanating from the same sovereign authority, and reject this *thread* because it is *civil* and retain *that* because it is ecclesiastical ? No—the whole must be rejected together, as entirely obsolete, and abrogated by their utter repugnance to our fundamental laws.

It follows, we think incontestably, from what has been said, that the relation which exists between the bishop and the plaintiffs, according to their own allegations, implies no civil contract, and consequently given rise to no civil obligations. It is not alleged, that any such contract exists. On the contrary they allege, that his salary has been withdrawn and suppressed, because the wardens had overstepped their power in allowing it, and because the bishop never preached, as required to do by the canons and laws of the church. We look, therefore, in vain, for any contract between the parties insisted on by one of the counsel for the plaintiffs in his printed brief, having for its object the gratification of some intellectual enjoyment, whether in religion, morality, or taste, or some convenience or other legal gratification spoken of in article 1928 of the Louisiana Code. On the contrary, the bishop is quite independent of the church wardens, except in relation to his spiritual or sacerdotal functions.

But the same learned counsel contends, that the right to nominate a curate, or the *jus patronatus*, is a civil right, and he quoted 1 vol. Devoti, 242 ; and the senior counsel quoted to the same effect, the "Dictionary of the *Jesuit Trevoux*." That it was a civil right, while it existed, may be true ; but there is no longer such a thing as a benefice, and consequently the right of advowson does not exist. It was partly for the reason that it was a *civil* right, and any law creating it a *civil* law, that we came to the conclusion that it is abrogated.

The wardens administer the temporalities of the church, and may give or withhold salaries at their pleasure; and as they cannot compel the bishop to *institute* a curate of their appointment, so neither can he compel them to pay one whom he may have appointed or approved. No one pretends that the bishop has a right to interfere in the administration of the temporalities of the church, and to appropriate to himself, or his subordinates, any part of the revenues of the corporation. The curate according to the charter, has a deliberative vote in those matters, as one of the wardens. It is true, it is the duty of the wardens to apply the revenues, in part, to provide in a suitable manner for public worship. But they are responsible only to their constituents, for the manner in which they perform that trust; and although they are authorized to make any appropriate contract for that purpose, it does not follow that they can compel any one to contract with them, or that the bishop of New Orleans is in any legal sense, subordinate to the wardens of one of the churches within his diocese, in relation to his clerical functions.

We have thought the occasion justified our entering thus at large, into an examination of this subject, and stating explicitly our views of the extent and grounds of religious liberty according to the constitution and laws of Louisiana, of which the defendant, by his exceptions, claims the protection; and in declaring that, in the opinion of the court, no man can be molested, so long as he demeanes himself in an orderly and peaceable manner, on account of his mode of worship, his religious opinions and profession, and the religious functions he may choose to perform, according to the rites, doctrine and discipline of the church or sect to which he may belong, and that this absolute immunity extends to all religions and to every sect. It is an ample shield, which it is the duty of the judicial power to hold with a firm hand, as well over the most exalted prelate of the church, as over the lowliest follower of him who was meek and lowly, and who emphatically declared that his *kingdom* is not of this world.

*Judgment affirmed.**

* *Soulé, Canon, and Roselius*, prayed for a re-hearing, urging: 1. That the right of presentation is strictly a legal, or civil right, capable of being enforced in a court of justice, under the law in force at the time the church of St. Louis was built.

JOHN McDONOGH v. JAMES CALLOWAY and others.

Where the owner of ground, in dividing it into lots for sale, reserves a part for a public alley, and subsequently sells the lots with reference to a plan on which the alley is described, and as fronting on the alley, the ground set apart for the alley must be considered as dedicated to public use; and the purchasers of the lots have a right to insist upon its being kept open for the purposes for which it was thus dedicated.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Grivot* and *Roselius*, for the plaintiff.

Bartlette, J. E. Jones, and *G. Strawbridge*, for the appellants.

SIMON, J. This case was lately before us on an interlocutory question which had arisen during its progress, in relation to the extent of the writ of injunction which had been granted by the judge, *a quo*, inhibiting the defendants from disturbing the plaintiff in the free use and enjoyment of the common passage described in his petition; and our judgment then was, that the sheriff should immediately demolish and remove the fence and obstructions in the said common passage, without prejudice to the rights of any of the parties on the merits. See the case lately decided between the same parties, 7 Robinson, 442.

Our former decision gives a full statement of the allegations contained in the plaintiff's petition, which was answered by the defendants Jones, who admitted that they were in possession, as owners, of a part of the alley mentioned in the petition, viz.: about one hundred and seventeen feet of the end fronting on New Levée street; but they denied all the plaintiff's allegations.

Judgment was rendered below on the merits in favor of the plaintiff, and the injunction was made perpetual, further ordering that the fence across the common passage on New Levée street,

2. That the change of government, and repeal of the Spanish laws, could not impair the vested rights of the plaintiffs, and of those under whom they claim. See the decision of the Supreme Court of the United States in the case of *Dartmouth College v. Woodward*, 4 Wheat. 512; also *The Trustees of Montpelier Academy v. George et al*, 14 La. 402. 3. That the rights claimed by the plaintiffs are not inconsistent with religious liberty, nor in any way incompatible with the institutions and laws of the State.

Re-hearing refused.

McDonogh v. Calloway and others.

and along said common passage be removed ; and from this judgment the defendants have appealed.

The facts of the case as shown by the record, are these : In the year 1822, John P. Jones, the appellants' ancestor, being the owner of a piece of ground on the batture of the suburb St. Mary, between Gravier and Poydras streets, caused a plan thereof to be made by Joseph Pilié, then the city surveyor. This piece of ground had a front on New Levée street, of twenty-nine feet two inches, and on Tchoupitoulas street of twenty-nine feet ten inches. The plan bears date the 12th of December, 1822 ; according to which the ground was divided into three distinct lots, to wit, one on New Levée street of *twenty-three feet only*, six feet and two inches having been taken from the original front for an alley, or common passage ; and the depth was ninety-one feet on one side and eighty-three feet on the alley side. The second lot has a front on the alley of sixty feet ; and the third has a front on Tchoupitoulas street of *twenty-four feet ten inches*, five feet having been taken for the alley ; so that the alley or common passage, runs through the square, having five feet front on Tchoupitoulas street, and six feet two inches on New Levée street, between the lots above divided, and the property of the plaintiff and other persons.

On the 25th of August, 1823, John P. Jones sold to Maloney that portion of the lot situated and fronting on New Levée street, with the following description in the deed of sale, to wit : " A lot of ground, together with all the buildings thereon erected, on the batture of suburb St. Mary, between Gravier and Poydras streets, *measuring twenty-three feet front* to Levée street, by one hundred and seventeen feet in depth, adjoining the property of Linton & Wilkins, and *one hundred and nine feet in depth on the other side, fronting an alley of six feet two inches in width, which said alley is not included in the sale, &c.*, the whole in English measure, and *conformably to the plan made on the 12th December, 1822, by Joseph Pilié, city surveyor, and hereunto annexed,*" &c.

On the 17th March, 1829, Maloney sold the same lot to Lal-lande, with the same description, the one hundred and nine feet in depth, "*fronting an alley of six feet two inches wide not in-*

cluded in the sale, and conformably to the plan of Joseph Pilié, &c.," referring to the sale from Jones to Maloney; and on the 29th of May, 1829, Lallande sold the same lot to Gros, with the same description, except that the lot being sold as containing twenty-three feet in front, by a depth on the alley side of one hundred and nine feet, no mention of or reference to the alley was made.

A copy of the plan referred to in the sales, was produced in evidence, and is certified by the notary as being a true copy of the original plan in his possession; and it is shown by the testimony of several witnesses examined on the trial, that the alley has always been used *as a common passage*; that it is used as such by the whole city; and that there are persons living on the alley. One of the witnesses says he has no other passage to the levée. Another states that the alley is known as *Natchez alley*, and has been open since at least twenty years, &c.; and the record contains the admission, that the plaintiff's title to the property described in his petition, *is derived by regular, immediate conveyances from John P. Jones.*

Under this state of facts, we are at a loss to conceive how the defendants could ever pretend to be the owners of the space of ground forming the alley in controversy. It is proved, that this alley was abandoned and dedicated to the public use by their ancestor, more than twenty years ago; that a plan of it was made under his direction, by the city surveyor, which plan was referred to in the sales of the adjoining property, as indicating the exact location of the lots, and of the alley along which they were to run in the depth. No reservation is made with regard to the alley, except that it is not included in the sale. It is left open for the use of the neighborhood and of the public; and we cannot believe that, if the defendants' ancestor had not really intended to abandon the narrow strip of ground which forms the alley, to the use of the public, and particularly of those to whom he had sold the adjoining lots, he would have separated it from the lots by him last sold, the front of which would have been more extensive, and consequently the lots themselves capable of being more advantageously sold. Surely, he did not intend to keep a lot of six feet two inches front on one side, and five feet

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front on the other side, as his property; for, having reserved it as an alley, *not included in the sale*, this shows that, under his plan, he intended that the alley should separate the ground which he had previously sold, from that which he had divided into three lots, and subsequently into two lots, in order that they might produce more; and that the alley left open should henceforth be used as a common passage. The dedication made by the plan, and subsequently recognized in the sales, is conclusive, and must be binding upon the former owner of the ground, the title to a part of which is derived from him by the plaintiff, who, in our opinion, is clearly entitled to the use and enjoyment of the alley, or passage now claimed by the defendants as their property. This right to use the passage results from the dedication made in the plan annexed to the sales, and cannot now be destroyed or claimed against, under the pretence, that the different subsequent division of the ground into two lots instead of three, shows a change in the original intention of the owner. It is true, that the depth of the front lots was increased, so as to include therein the middle lot marked No. 2 on the plan: but this is the only alteration. The fronts are the same on both streets; and certain it is also, that the vendor, in describing the lot in the sale to Maloney, stipulates that it has one hundred and nine feet in depth *on the other side, fronting an alley of six feet two inches in width, which said alley is not included in the sale, the whole conformably to the plan hereunto annexed.* This sale was made after the owner had thought proper to change the depth of his lots; but he still preserved the alley as indicated on the plan, under which the alley was clearly dedicated to public use.

Judgment affirmed.

EX PARTE THOMAS POWELL.

An executor is not a public officer within the meaning of the 14th sect. of the stat. of 10 February, 1841. The office of executor is a private trust. C. C. 2687, 2788. Since the stat. of 28 March, 1840, abolishing imprisonment for debt a *ca. sa.* cannot be taken out on the return of a *fi. fa.* unsatisfied, against one who has converted to his own use money received by him as executor.

Ex parte Powell.

APPEAL from the District Court of the First District, *Buchanan, J.*

Hoffman, for the defendant.

J. C. Clark, contra.

BULLARD, J. The return by the sheriff of the Criminal Court to the writ of *habeas corpus* sued out by the appellee, Thomas Powell, shows, that he was imprisoned in virtue of a writ of *capias ad satisfaciendum*, issued by the Court of Probates, to enforce the payment of a judgment rendered against him at the suit of Fink, dative executor of Barnes. The prisoner was ordered to be released from confinement, and the judgment creditor has appealed.

It appears that the judgment sought to be enforced by this writ, was rendered against Powell, as the dative executor of Sarah Barnes, deceased, in pursuance of the provisions of the act of 1837, relative to the settlement of successions. See B. & C.'s Digest, pp. 2, 3.

The issuing of the writ of *capias ad satisfaciendum*, since the passage of the act of 1840, which declares that that writ is abolished, is attempted to be justified by applying to executors the severe penalties provided by law for the case of public officers, who having received money in their official capacity, convert it to their own use, or do not account for it, according to the 14th section of the act of 1841, entitled "An act to create two additional sheriffs for the parish of Orleans;" &c. See B. & C.'s Digest, pp. 783, 787.

An executor is not, in our opinion, a public officer, within the meaning of this act of 1841. He is not required to take an oath to support the constitution of the United States, because he may be an alien. He holds no commission from the appointing power, and is not removeable by address, nor liable to impeachment. He collects money, not to be paid over as soon as received, but to be administered by him, and employed in paying the debts of the estate; and he is bound to pay over the balance only upon a settlement of his accounts. The office of executor is a private trust, and not a public office. Civil Code, arts. 2787, 2788. The rules applicable to sheriffs, and other collecting officers, cannot, by any just analogy, be extended to testamentary executors.

Judgment affirmed.

JAMES H. LEVERICH, Administrator of the Succession of Charles McMillen, v. DENIS PRIEUR, Recorder of Mortgages.

A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages existing on it created by the deceased. The purchaser takes the property free of the encumbrances; and the Probate Court may order their erasure. But a District Court cannot in such a case, issue a *mandamus* to the recorder of mortgages directing him to erase the mortgages, where the mortgagees are not made parties to the proceeding. Such a proceeding would be unavailing, unless carried on contradictorily with the parties interested, and against whom it is intended to be used.

A recorder of mortgages is not bound, *ex officio*, to erase from his records mortgages extinguished by a probate sale, or by the want of a new inscription, on being informed of the circumstances under which they are extinguished. He may do so, but it will be at his peril. The question whether the mortgages have been extinguished, can only be decided contradictorily with the mortgagees.

APPEAL from the Parish Court of New Orleans. *Maurian, J. L. Peirce*, for the appellant, cited 2 Mart. N. S. 231, 336. 6 La. 283. 14 La. 163. Code of Pract. art. 708. 1 Robinson, 378.

Roselius, for the defendant, cited *French v. Prieur*, 6 Robinson, 299.

SIMON, J. The object of this application is to compel the recorder of mortgages to erase and cancel certain conventional and judicial mortgages, existing on property formerly belonging to the estate of Charles McMillen, deceased, which was disposed of and sold at the request of the administrator, by virtue of an order of the Court of Probates of the parish of Orleans. The applicant represents that, although by the said sale and adjudication the mortgages are cancelled in law, yet they appear upon the records and in the certificates of the recorder of mortgages, and that the purchasers of the property refuse to comply with the adjudication, until the same are erased, and a title clear of all incumbrances is tendered to them. He prays, that a *mandamus* may be issued, directed to the recorder to compel the erasure and cancellation.

The recorder denies the right of the applicant to bring this suit; avers that the proceedings ought to be carried on contradic-

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torily with the mortgagees, who alone have a legal interest in the matter; and contends, that the Court of Probates, by whose order the property has been sold, can alone order the respondent to erase and cancel the mortgages.

The inferior judge being of opinion, that the grounds assumed by the defendant were supported by law, discharged the rule, and refused to issue the *mandamus* prayed for; and from this judgment the plaintiff has appealed.

The only evidence found in the record is a certificate of the register of wills, giving a statement of the sales of the property upon which the mortgages sought to be raised bore at the time of the sales, and authorizing and empowering the recorder of mortgages to erase from his records all the said mortgages, so far only as the same bear on the landed property and slaves therein described. A copy of the *procès verbal* of sale, and of the certificate of mortgages therein recited, is also contained in the record; but it appears that none of the proceedings had previous to the sale, were produced in evidence to show its legality.

The question presented in this case is not new in our jurisprudence, and we had occasion to express our views upon it in the case of *Benjamin F. French v. Prieur*, decided in December last, 6 Robinson, 299, in which, under a similar state of facts, we said that, "we know of no authority that the District Court has to issue a *mandamus* to the recorder of mortgages, commanding him to erase mortgages, without notifying the parties interested in them." There we again recognized the doctrine that, "a sale of the property composing a succession, legally and regularly made under a judgment of the Court of Probates, discharges the mortgages on it, which may have been given by the deceased; and that the purchasers take it free from incumbrances, which the Court of Probates has the power to erase." 2 Mart. N. S. 225, 336; 9 La. 197; 17 La. 378. In the case of *The State v. Leblanc*, 5 La. 330, the same conclusion was adopted, and the rule prayed for was discharged, as those having an interest, real or pretended, adverse to the application, had not been made parties. So it was in the case of *Gasquet v. Dimitry*, 6 La. 454, in which this court held in substance, that, although the sheriff is authorized, under art. 708, of the Code of Practice, to release

all the posterior mortgages, he cannot be ordered to give the release, unless the proceedings instituted for that purpose, are carried on contradictorily with the mortgagees, and after due notice served upon them. Indeed, there would be no use or object in such proceedings had in the absence of the interested parties, as their rights, if they have any, could not in any manner be affected by a judgment rendered against the recorder of mortgages, ordering him to erase the mortgages. It would be as to them, *res inter alios acta*. On the other hand, if the mortgages are legally extinguished or destroyed by the effect of the probate sale of the property, we cannot see what benefit will be derived to the party by ordering the recorder to erase them from his books, when his doing so cannot prejudice the rights of those who have an interest in the matter. It is now well understood, that a proceeding of this nature is entirely unavailable, unless carried on contradictorily with those against whom it is intended to be used.

We have been referred to a case in 14 La. 103, in which this court went so far as to say that, "when judicial or conventional mortgages are extinguished by a probate sale, or by the want of a new inscription for more than ten years, they should be noted by the recorder, and no longer be included in his certificates." But this is only recognizing the legal effect of such sales, or of the want of a new inscription with regard to pre-existing mortgages; and this court never intimated that the recorder was bound, *ex officio*, to make the erasure of such mortgages, and to expunge them from his books, on being informed of the circumstances under which they were legally extinguished. He may perhaps do so, if he is certain of the facts; but it will be at his peril, and he will not be protected against the consequences of his act, if improperly done. It cannot be doubted, that mortgages are extinguished by the probate sale of succession property, so far as such mortgages have been created by the deceased, when it has been legally made; but it is clear, that the question whether the sale is legal or not, and whether, in this case, the mortgages have ceased to have any effect, as a consequence of the said sale, cannot be decided in the absence of the mortgagees,

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against whom our judgment could not have the force and effect of *res judicata*.

Judgment affirmed.

PIERRE BLANC and others v. MARIE URSULE PERILLIAT and others, Heirs, &c.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Castera*, for the appellants.

Canon, for the defendants.

SIMON, J. The plaintiffs, who are the heirs of Louis P. Blanc, deceased, seek to recover the sum of \$600, which, they allege, was received by the defendants' ancestor on the 7th of July, 1827, from Françoise Radaze, on account of the succession of the said Blanc. They state that Perilliat's succession was opened on the 22d of May, 1829, and pray that the amount claimed be paid to them by the defendants, with interest from the day the succession was opened.

The defendants pleaded the general issue, denied specially the plaintiffs' capacity to sue, and further pleaded prescription.

Judgment having been rendered below in favor of the defendants, the plaintiffs appealed.

This claim is based on a letter, written by the defendants' father to Radaze, dated New Orleans, 7th July, 1827, as follows: "A Mr. Radaze, au Rapide. Monsieur: J'ai reçu votre honorable lettre en date du 30 juin dernier, avec six cent piastres qu'elle contenait, dont je vous fais crédit, en à compte de la succession de feu L. Blanc. Veuillez bien agréer mes sincères respects." The orthography of the letter is this: *avaique six cent piastres qu'elle contenait don je vous fait credit, en acontte de la succession, &c.* From this letter it is pretended, on the part of the plaintiffs, that the sum of \$600 was deposited by Radaze in the hands of Perilliat, for the benefit of Blanc's succession; and on the part of the defendant, that the amount claimed

must have been paid on account, and in part payment of a debt due to their father by Blanc's succession.

No other evidence was produced by the plaintiffs in support of their claim; but the record shows, that Blanc died at Alexandria, in 1819; that Radaze was appointed curator to his estate in May, 1838; and that by powers of attorney executed in France by the plaintiffs in January and March, 1837, Radaze had been appointed their attorney in fact. No reason is shown why Radaze, who was the friend and countryman of the deceased, was induced to deposit the money of the succession in the hands of Perilliat, who was also one of his countrymen, and the absence of Radaze's testimony is not in any manner accounted for.

In this imperfect state of the evidence, we think the judge, *a quo*, did not err. The letter relied on as the only proof of the claim, does not establish satisfactorily that the amount forwarded and remitted by Radaze to Perilliat in 1827, was received by the latter as a deposit; on the contrary, the expressions used in the letter, "*six cent piastres dont je vous fais crédit en à compte de la succession*," seem to imply that credit was given by Perilliat to the succession for \$600, received on account, or in part payment of a larger debt. Why was the money of the succession in the hands of Radaze in 1827? Why did he not keep it to remit it to the heirs? And what induced him to pay it over to Perilliat, who is not shown to have had any thing to do with the succession? Why should Perilliat credit the succession, if nothing was due to him? Radaze lived in Alexandria, and more than ten years had elapsed before any claim was set up by him, or by Blanc's heirs, against Perilliat, or his heirs, for the reimbursement of the money. Nay, it is not shown that Radaze ever claimed it, either in his own name as curator, or as the agent of the heirs; and this suit was only brought in 1839. It is not probable that the plaintiffs' claim would have been kept dormant for such a long space of time, and that Blanc's heirs would have permitted the funds of the estate to remain in the hands of others for twenty years, if those funds had really belonged to the succession. The plaintiffs' demand is not sufficiently sustained by the evidence.

Judgment affirmed.

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AUGUSTIN MACARTY v. THE NEW ORLEANS CANAL AND
BANKING COMPANY and others.

The authority of an auctioneer to sell immoveables or slaves, and the conditions of the sale must be in writing. C. C. 2584. Parol evidence is inadmissible to prove the assent of the owner to conditions of sale proclaimed, at the time, by the auctioneer. C. C. 2415.

An auction sale of immoveables or slaves, not authorized or ratified by the owner in writing, is invalid, unless admitted by the party against whom it is sought to be enforced. C. C. 2255, 2256.

The written authority of the vendor is the best evidence of the terms and conditions of the sale of an immoveable or slave at auction. The *procès verbal* of the auctioneer is the next best.

In the absence of any allegation of fraud or error, parol evidence is inadmissible to prove conditions or stipulations beyond those contained in an authentic act of sale. C. C. 2256.

APPEAL from the District Court of the First District, *Buchanan, J.*

J. and *D. Seghers*, for the appellant.

• *C. M. Conrad, Benjamin, and T. Slidell*, for the defendants.

SIMON, J. The plaintiff states, that on the first of May, 1833, he became the purchaser at public auction, being the highest bidder, of nine lots of ground situated in the parish of Jefferson, at the place called Carrollton, four of which lots were sold as fronting on Canal Avenue, which avenue, according to the plan, is the only outlet for the whole of the nine lots either to the river, or to the canal, and thence to the city. He represents, that by the conditions of the sale, the purchasers were to have the privilege of using the turnpike road along the canal from Carrollton to the city. That on the plan by which the sale was made, and which was exhibited at the time of said sale, there was pointed out a broad road marked as Canal Avenue, and running across Carrollton from the canal to the river. That, at that time, a gang of negroes were employed in clearing and opening the road. That it was announced and proclaimed by the vendors, at the sale, that the same would be finished and completed by them, but that a short time afterwards, the hands were withdrawn and the work abandoned, when in December following, it was again resumed, and carried to the length of twelve *arpens*, and again abandoned by the vendors.

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He alleges that it was the intended easy communication with the city through the Canal Avenue, as held out to the bidders at the time of the sale, that induced him to bid for the lots; that accordingly he has improved said lots by erecting three large buildings thereon; that he enclosed and cleared the land, &c., without being able to derive any benefit therefrom, for want of an outlet; that, owing to this cause, he has lost 300 cords of wood, and has sustained other damages, which he estimates altogether at the sum of \$4000 and upwards, besides the future damages which he is exposed to suffer till the road be made. He prays that the defendants, his vendors, may be decreed to finish and complete the road according to the plan, and that they be condemned to pay him \$4000 damages.

The defendants filed separate answers, in which they all pleaded the general issue.

The case was tried before a jury, who found a verdict for the defendants, and judgment having been rendered thereon against the plaintiff, he took this appeal.

The only question which this case presents, grows out of a bill of exceptions contained in the record. This bill recites, that the plaintiff offered to introduce a witness to prove that when the Carrollton lots and squares were offered for sale at the Exchange, the auctioneers, by the directions of the vendors, who were present or represented, did publicly declare and proclaim, that the Canal Avenue laid down on the plan of Carrollton would be immediately made and completed, and that the sum of money necessary for that purpose was set aside to that effect. The bill states also, that the plaintiff next offered to introduce in evidence the original memorandum book of the auctioneer, in which the sale of the lots and squares is recorded, to show that the above mentioned promise was written in the said book immediately before the several adjudications, the other terms and conditions of the sale being annexed to the book in print, taken from the advertisements in the public papers. All this evidence was objected to by the defendants' counsel on divers grounds:

1st. Because the law requires written evidence of the authority from the vendors to the auctioneer to sell, and of the conditions of the sale.

2d. Because the best evidence of the terms and conditions on which a sale at auction was made, is the *procès verbal* of the auctioneer, which *procès verbal* is referred to in the sale from the defendants to the plaintiff, and can easily be obtained, and it is admitted, contains no such objection as the one, on the alleged breach of which this suit is founded.

3d. Because the evidence offered is against and beyond the contents of the authentic act of sale from the defendants to the plaintiff, already produced in evidence by the latter.

These objections were sustained by the judge, *a quo*, who rejected the evidence offered.

Before proceeding to the examination of the questions presented by the bill of exceptions, it is proper to remark, that the notorious act of sale of the lots purchased at auction by the plaintiff, contains none of the conditions by him declared upon in his petition, in relation to the making and completing of the Canal Avenue by the vendors at their own expense. The avenue is not even alluded to in the sale, except that it is pointed out as one of the boundaries of four of the lots, and that it is stipulated that the proprietors of squares, and occupants of the premises, shall have the privilege of passing and repassing over the turnpike road to be constructed along the canal, &c. The *procès verbal* of the adjudications is also referred to in the sale, with the conditions therein contained; and the plan mentioned in the petition as exhibiting the location and extent of the avenue, was not produced in evidence, and is not found in the record.

I. With regard to sales at auction of immoveable property and slaves, it cannot be doubted that the authority which is to be given by the vendors to the auctioneer, must be *in writing*, and that the conditions under which such sales are to be made, must also be in writing. Art. 2584 of the Civil Code says, in positive terms, that the auctioneer must proclaim the conditions in a loud and audible voice, after having received them *in writing*, from the seller; and in the case of *Pew v. Livaudais*, 3 La. 460, this court held that, as arts. 2255 and 2256 of the Code, require the assent of the parties to a sale of real estate to be written, unless the party against whom the sale is sought to be enforced admits it, no validity in an auction sale of real property can be recognized,

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the owner of which did not authorize or assent to it in writing. Here, it is admitted, that the *procès verbal* of adjudication by the auctioneer, contains no condition such as the one alluded to in the petition ; and if any such was proclaimed by the auctioneer on the day of sale, it must be shown that this was done under the written authority of the vendors, as no parol evidence can be received to prove their assent thereto. Civil Code, art. 2415.

II. This ground was also properly sustained. It is clear that secondary evidence cannot be admitted, when it is shown that better evidence exists ; and the best evidence of the terms and conditions on which a sale at auction has been made, is first, the written authority of the seller, and second, the *procès verbal* of the auctioneer. In this case, the *procès verbal* is referred to in the notarial act of sale ; it is shown that it can be obtained, if necessary ; and if the plaintiff has not thought proper to produce it, it is because it does not contain any of the conditions on the non-compliance with which he has based his action. This cannot be supplied by the memorandum book of the auctioneer unless it be under the handwriting of the vendors, which the plaintiff does not pretend to be the case. The proof offered is not better than parol evidence.

III. The object of the evidence sought to be introduced, is to prove conditions and stipulations beyond those contained in the sale from the defendants to the plaintiff. The petition contains no allegation of fraud or error ; and there is no rule better known, than that parol evidence cannot be admitted against or beyond what is contained in a written act, or to prove what may have been said before, at the time of, or since making the said act. Civil Code, art. 2256.

On the merits, we have not discovered any reason why the verdict of the jury should be disturbed, as the plaintiff has furnished no legal proof of his allegations.

Judgment affirmed.

JOHN RIST v. JOHN HAGAN.

The purchaser of a slave, who institutes a redhibitory action on the ground that the slave is a runaway, is not bound to prove that the vice existed before the sale, when discovered within two months thereafter; but this presumption ceases where it is proved that unusual punishments have been inflicted on the slave. Stat. 2 January, 1834, s. 3.

One who has given notice in writing of his intention to become a resident of the State to the parish judge of the parish in which he proposes to reside, but who has not resided within it one year without interruption, not having acquired a residence in the manner authorized by the stats. of 7 March, 1816, s. 2, and 16 March, 1818, s. 1, must be considered as "*not domiciliated in the State*" within the meaning of art. 2512 of the Civil Code; and, in case of his absence from the State within a year from the date of a sale made by him, the prescription of one year against redhibitory actions will be suspended as to him during his absence.

APPEAL from the District Court of the First District, *Buchanan, J.*

Peyton and I. W. Smith, for the plaintiff.

H. H. Strawbridge, for the appellant.

SIMON, J. This is a redhibitory action based upon the allegation that one of three slaves, purchased by the plaintiff from the defendant, by notarial act passed on the 21st of January, 1839, and warranted against all redhibitory maladies and vices prescribed by law, was at the time of the sale in the habit of running away, and that this vice was discovered within two months after the sale. The plaintiff further states, that the defendant had knowledge of the defect, and neglected to declare it; that the slave, who is named John, was also afflicted, at the time of the sale, with bodily maladies, which were also within the knowledge of the vendor, who did not declare them; and that he, plaintiff, has been greatly disappointed, and put to much inconvenience, trouble, labor and expense, in consequence of the said defects and vices of the slave John, whereby he has been obliged to pay the sum of \$100 for apprehending him when runaway, also, to pay \$300 for physicians' services and medicines, and has sustained damages to the amount of \$500; all which sums, added to \$1100, the price of the negro, make an amount

of \$2000, for which the plaintiff claims judgment, and the annulling and cancelling of the sale.

The defendant joined issue by first denying that the habit of running away in the slave John, existed at the time of the sale; he also denies that it was discovered within two months after the sale, and says that, if it ever did appear either before or after two months, it was occasioned by severe and unusual treatment of the slave, on the part of the plaintiff. The defendant further denies the existence of any disease in the slave either before or after the sale; avers, that he is and was before the sale, a *bona fide* resident of New Orleans; and pleads prescription.

Judgment was rendered by the inferior tribunal in favor of the plaintiff, annulling the sale, and condemning the defendant to pay the sum of \$1100, with interest, &c.; and from this judgment the defendant has appealed.

The evidence establishes satisfactorily, that the slave John has run away several times, at divers periods, from the plaintiff, since the sale; but there is no proof of his having been in the habit of running away before the sale. It is shown, however, that he ran away twice at least within the two first months after his purchase, and was absent about ten days the first time, and about two weeks the second time. He was taken, on one of these occasions, ten miles from home; and the witness adds, that the slave's general habits were those of a great runaway, and great drunkard and thief. Another witness testifies, that the negro John was well treated, and not punished either cruelly or unusually; that he was whipped once after having run away and been caught, and that he had no cause whatever for running away, and would not have been whipped if he had not run away. Another swears, that the negro ran away soon after the plaintiff bought him; was absent weeks at a time; was in the woods nearly all the time when not sick; and is a *practical runaway negro*.

According to a law of 1834, (Bullard & Curry's Digest, p. 792,) the buyer of a slave who institutes a redhibitory action on the ground that such slave is a runaway, is not bound to prove that the vice existed before the date of the sale, when such vice has been discovered within two months after the sale. It is further

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provided in that law, that, where unusual punishments have been inflicted, the legal presumption in favor of the buyer shall cease. Here, the proof of the discoveries being made within two months, is positive; the slave was not unusually punished; and it is proved, that the punishment which he received, was inflicted after his having run away several times. It is clear, therefore, that the punishment was not the cause of his running away, but the consequence of the existence of a vice in the slave for which the plaintiff was compelled to chastise him. It is shown also that, at the date of the sale, the slave had been less than eight months in the State; and this circumstance, under the last *proviso* of the law above quoted, puts this case under the immediate application of the presumption therein provided for.

But the next question is that of prescription, pleaded under the 2512th article of the Civil Code, the second exception to the operation of which is, "when the seller not being domiciliated in the State, shall have absented himself before the expiration of the year following the sale, in which case, the prescription remains suspended during his absence." The sale in question was passed on the 21st of January, 1839, and the citation was served in this suit on the defendant, on the 29th of January, 1840.

Now, by referring to the 2d section of an act of the Legislature of the 7th March, 1816, (B. & C.'s Digest, p. 286,) and to the 1st section of a law of the 16th of March, 1818, (B. & C.'s Digest, p. 287,) we find, 1st; that "residence within the State shall not be considered as acquired, until the individual coming into the State *shall have remained within the same for twelve months* following the day of his notice in writing to the parish judge of the parish where he proposes to reside, of his intention to acquire residence;" and 2d, that the preceding law was so amended that the notice to the parish judge was no longer indispensable, provided proof was made before any jury or justice of the peace, of *one year's uninterrupted residence*, and of the occupation of a house, &c. Here, it is true, the defendant gave the notice of his intention to reside in Louisiana to the parish judge of New Orleans, on the 29th of January, 1838; but that is less than one year previous to the sale; and the evidence shows that he had remained in the State only about eight months between the two dates. It is further

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shown, that the defendant is in the habit of leaving the State in the summer and returning in the winter season, without leaving any agent to represent him; and his witnesses say, that he was absent from the State during the summer months of 1839; that he spent that summer in Maryland and Virginia; had no one in New Orleans to attend to his business; that he left, that summer in June, and returned in October; and that the defendant, since his declaration, has always passed the summer out of the State. It is clear, therefore, that at the time this suit was instituted, the defendant could not be considered as being domiciliated in the State, as he had not acquired the uninterrupted residence of one year, required by the laws of 1816 and 1818. Under those laws, the declaration made to the parish judge cannot fix the residence or domicil of the party in this State, unless it has been followed by an uninterrupted residence of one year therein; and this is required in all cases where a person, coming from a foreign country, or from any one of our sister States, wishes to acquire a residence within the limits of Louisiana. In the case of *Guilliet v. Erwin*, 7 La. 580, this court held, that where a whole year has not expired, within which a plaintiff had a right to act and could act against a defendant not domiciliated in the State, before the institution of his suit, the prescription provided for by art. 2512, cannot prevail, but remains suspended during the defendant's absence; and that the absence of such defendant from the State, not being domiciliated within its limits, can be offered as an excuse and justification on the part of the plaintiff, for not having commenced his suit sooner. This rule is precisely applicable to the present case, and the defendant's plea of prescription was, therefore, properly overruled.

*Judgment affirmed.**

**H. H. Straubridge*, for a re-hearing. In *Gravillon v. Richards*, 13 La. 293, it was held that the mere will, combined with a few days residence, was sufficient to acquire a domicil. See also *Hennen's case*, 12 La. 190. *Waller v. Lea*, 8 La. 314. Sirey, vol. 13, part 2, 353. Two years had elapsed between defendant's declaration of his intention to acquire a residence, and the institution of this action; and his actual residence within the State exceeded fourteen months. In the case of *Guilliet v. Erwin*, the whole time of the residence within the State did not exceed twelve months.

Re-hearing refused.

SEVERIN CHAUFFEUX v. FRANÇOIS PRALON.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Canon*, for the plaintiff.

Biron, for the appellant.

SIMON, J. This is a suit for damages based upon the allegations that, in August, 1841, the defendant, without the plaintiff's consent, and without any reasonable cause, obstructed the door of the plaintiff's house for more than a month, by causing a quantity of casks and barrels to be heaped in front of said door, close to the threshold thereof; that, in September following, the defendant committed a violent assault and battery upon the plaintiff, by which the latter was severely wounded; and that subsequently, said defendant, maliciously, and without any cause, procured a warrant to be issued against the plaintiff, under the pretence that the latter intended to murder him, &c. The petitioner prays for judgment against the defendant for \$2500 damages.

The answer pleads the general issue, and further sets up a claim in reconvention against plaintiff, to the amount of \$3000, founded on intolerable, violent, and abusive conduct on the part of said plaintiff, on divers occasions.

This case was not submitted to a jury, but the judge, *a quo*, having rendered judgment in favor of the plaintiff, for the sum of \$300 damages, the defendant, after a motion for a new trial, has appealed.

We have carefully examined the evidence adduced by both parties on the trial of this cause, and are of opinion, that the allegations contained in the plaintiff's petition have been satisfactorily made out; indeed, the conduct of the defendant towards the plaintiff, is shown to have been so unlawful, outrageous, and malicious, that we cannot forbear expressing our regret, with the judge, *a quo*, that this case was not submitted to a jury, who are the proper judges in such cases, and who would have been able to assess the damages due to the complainant at their true and proper amount; as, from the facts and circumstances disclosed, the judgment appealed from appears to us to be very moderate,

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and even, perhaps, inadequate to the extent of the injury sustained. However this may be, we think the judgment complained of is fully sustained by the evidence.

Judgment affirmed.

GEORGE STERTZBACK v. JOHN QUIRK.

One who causes a drunken person to be arrested by the police for disturbing the peace in the neighborhood of his residence, is not liable in damages for so doing.

APPEAL from the Parish Court of New Orleans, *Maurian, J. McCarthy* and *Haynes*, for the appellant.
Schmidt, for the defendant.

MORPHY, J. This is an action in damages against the defendant, for having maliciously and wickedly, as the petition alleges, caused the plaintiff to be arrested by the watch of the Second Municipality, and thrown in prison. After hearing the plaintiff's evidence, the judge of the lower court was of opinion, that he had not made out his case, and nonsuited him. We can come to no other conclusion. The testimony shows that, on the occasion referred to in the petition, the plaintiff, who was drunk, was arrested twice on the same night, for making a noise and disturbing the public peace in the immediate neighborhood of the defendant's house; and that, even without any request or interference on the part of the latter, the watchmen of the Second Municipality would have thought it their duty to arrest and confine him, on account of his improper and disorderly behavior. We find in the record two bills of exceptions to the refusal of the judge to admit evidence offered on the trial. We deem it unnecessary to notice them otherwise than by stating that, in addition to the grounds upon which the judge properly rejected the evidence, it was clearly inadmissible, on the score of irrelevancy.

Judgment affirmed.

MARIE LOUISE PASCAL v. LOUIS A. DUCROS, Sheriff of the
Commercial Court of New Orleans.

Though sheriffs and other public officers, acting in good faith, within the sphere of their duties, and in obedience to legal process, are entitled to protection, yet when they act in a manner contrary to their own convictions of right, and upon bonds of indemnity, persons injured by their proceedings are entitled to a liberal measure of damages.

In an action against a sheriff for damages, for the illegal seizure and removal of plaintiff's furniture, under an execution against a third person, evidence is admissible, under a general allegation that the furniture was removed against plaintiff's earnest remonstrances, to show, in aggravation of damages, the manner in which the furniture was removed, and all the concomitant circumstances.

In assessing damages for an illegal seizure of furniture, made by a sheriff under an execution against a third person, the jury should take into consideration the manner in which the seizure was made, and the degree of rigor or lenity with which the officer acted.

The deputy by whom an illegal seizure was made, need not be joined, as a co-trespasser, with the sheriff, in an action against the latter for damages.

After an answer to the merits, an exception on the ground of the non-joinder of a co-trespasser, is too late.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Elwyn* and *R. Hunt*, for the plaintiff.

A. Bodin, for the appellant.

BULLARD, J. This is an action of trespass, against the late sheriff of the Commercial Court, who is charged by the plaintiff with having sent one of his deputies to her house to seize property alleged to belong to Deslonds, at the suit of Cordeviolle and Lacroix.

She alleges, that he seized furniture belonging to her, notwithstanding her repeated and earnest protestations that it was not the property of the defendant in the execution. That the furniture was taken away, to the great inconvenience of her numerous family, and her great damage. That the deputy sheriff acted in utter disregard of her entreaties, and in contempt of her just rights. There was a verdict for the plaintiff for \$800 damages, and the defendant has appealed.

It is clearly shown, that the furniture seized and taken away, belonged to the plaintiff; that the deputy sheriff was notified of

the fact, went away and obtained a bond of indemnity from the plaintiffs in the execution, and then persisted in making the seizure. The trespass was therefore clearly proved, and it was for the jury to appreciate the damages sustained by the plaintiff; and although sheriffs, and other public officers acting in good faith, within the sphere of their duties, and in obedience to legal process, are entitled to protection, yet when they act in a manner contrary to their own convictions of right, and upon bonds of indemnity, persons injured by their illegal proceedings, are entitled to a liberal measure of damages.

The defendant and appellant relies for a reversal of the judgment, upon the following points :

1. Because improper evidence was allowed to be given to the jury.

2. Because the charge to the jury prayed for by the defendant, was refused.

3. Because the judge ought to have awarded a new trial.

4. Because, in actions of trespass, judgment can not be rendered against one of the co-trespassers alone.

1st. The improper evidence complained of, consisted in the testimony of witnesses to prove the wanton and careless way in which the deputy sheriff seized and carried away the furniture. It is said there is no allegation in the petition to authorize such evidence in aggravation. It appears to us differently. The petitioner states, that her furniture was taken away in disregard of her earnest entreaties and remonstrances ; and, we think, that in actions of this kind, evidence may well be admitted to show the manner in which the act was committed, and all the concomitant circumstances.

2d. The judge, instead of charging the jury as requested, told them that a sheriff, in the execution of a writ of seizure, must seize only the property of the defendant ; that, in case of doubt, he is to pause and ascertain who is the owner ; that, after being forewarned by a third person that the property is that of such person, and not of the defendant, if, on receiving a bond of indemnity from the creditor, he proceeds with the seizure, and it turns out that the property is not that of the defendant, he is liable in damages to the real owner, and that the jury are to take into

consideration the manner in which the seizure was made, and the degree of rigor and roughness, or of lenity, with which the sheriff acted.

This charge accords substantially with what we have just said on the subject, and the court did not err in so instructing the jury. The case relied on in *1 Baldwin*, 140, appears to us to support the charge as given.

3d. It is next urged, that the court erred in refusing a new trial on one of the grounds upon which it was asked, to wit, that the testimony admitted changed the nature of the action. We have already expressed our opinion, that the evidence was properly admitted, to show in what manner the deputy sheriff proceeded.

4th. The fourth ground rests upon the assumption that there were more than one trespasser, and consequently, that all should have been joined in the action; and an exception to that effect was offered and rejected at a late period in the proceedings, and after an answer to the merits. The deputy sheriff was acting in that capacity, and consequently the sheriff was responsible for his acts, and they cannot be considered as co-trespassers. But even if it were otherwise, the exception not being a peremptory one, came too late.

Upon the whole, we see nothing which could justify our interference. The sheriff instead of obeying his writ, followed the orders of the plaintiffs in the execution, disregarded the possession of the plaintiff, notwithstanding her urgent entreaties, and rigorously treated the property in her possession as that of the defendant in the execution. He must take the consequences of his illegal act, and look elsewhere for indemnity.

The judgment of the Parish Court is, therefore, affirmed, with costs.

SAME CASE—ON A RE-HEARING.

BULLARD, J. We have attentively considered and weighed the arguments addressed to us on the re-hearing in this case.

Lartigue v. Claiborne, Marshal.

Although we should have been better satisfied with the first verdict, which was set aside and a new trial granted ; yet, with all our disposition to protect public officers in the discharge of their duties, we are not prepared to say, that the last verdict was so flagrantly wrong as to authorize our interference. The sheriff acted contrary to his own convictions of his duty, on a bond of indemnity from the plaintiffs in execution. The question of damages was fairly left to two juries, the last of which gave heavier damages than the first. We have no standard so precise as to enable us to say that the jury erred as to the amount of damages, in a case where, in consequence of the illegal conduct of the deputy sheriff, the plaintiff was put to considerable inconvenience.

The judgment first pronounced must remain undisturbed.

LUCIEN LARTIGUE v. CHARLES CLAIBORNE, Marshal of the
City of New Orleans.

A marshal is responsible to the party injured, for any damage sustained by the latter in consequence of an illegal sequestration of his property. The marshal must look for indemnity to the party under whose directions he acted.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Rousseau and Lambert*, for the plaintiff, cited Civil Code, art. 2294. Bullard & Curry's Dig. p. 221, No. 43, § 19.

Canon and Roselius, for the appellants.

SIMON, J. The defendant Claiborne, marshal of the City Court of New Orleans, and the persons by him called in warranty, are appellants from a judgment which allows the plaintiff the sum of \$293 50 damages, sustained under the following circumstances :

It appears that, on the 7th June, 1842, Jean Esteben, one of the warrantors, having purchased of one Gourdé, by an act under private signature, six cows of the first choice, for the sum of one hundred and sixty-eight dollars, the cows were not delivered to the purchaser, but were, on the 18th of the same month, by a

notarial act, sold, with other property, by Gourdé, to the plaintiff, to whom delivery was made of all the objects sold. On the 19th of July following, a suit was instituted by Esteben against Gourdé before the City Court, complaining that the cows were illegally detained by the latter, and praying that they might be sequestered. This was ordered, and accordingly the cows were taken possession of, on the same day, by the defendant's deputy, notwithstanding the opposition of the plaintiff, who showed him his bill of sale; but, in consequence of their being claimed by the plaintiff, the city marshal took a bond of indemnity from the claimant Esteben, who, having on the same day bonded the property sequestered, took the cows into his possession. The two bonds are signed by Pierre Esteben as surety; and the evidence shows, that when the writ of sequestration was executed, the property was in the plaintiff's possession. The plaintiff intervened in the suit before the City Court, for the purpose of opposing the seizure made under the writ of sequestration, and of establishing his title to the property sequestered contradictorily with Esteben; when, after a full investigation of the parties' respective rights, judgment was rendered in favor of the intervenor, ordering, that the sequestration be set aside, and that the cows be delivered back to him as his property.

The question of ownership having been thus settled by the judgment of the City Court, it is clear, that the plaintiff's cows were illegally seized and sequestered, and that, therefore, the marshal is liable to indemnify him for the loss which he may have sustained in consequence of the illegal acts complained of. The marshal had no right to seize and sequester the property of another person, particularly after having been made aware of the plaintiff's title thereto. In case of doubt, it was his duty to pause and ascertain who was the real owner thereof; and it is no excuse to say, that the seizure was made under the directions of the creditor. The marshal took a bond of indemnity, which may perhaps secure him against the consequences of his illegal acts, so far as he may be indemnified by his co-defendants; but the plaintiff having looked to him to repair the injury, it only remains for us to ascertain whether the judgment appealed from is autho-

Parrish v. Cirode.

rized by the evidence, with regard to the extent of the damages allowed.

It is shown by the record, that the plaintiff's cows were taken out of his possession on the 19th of July, 1842, and that they were not returned to him until the 30th of August following. The witnesses all agree, that they were not delivered back in the same condition in which they were at the time of the seizure. The plaintiff's witnesses say, that they were returned in very bad order, and that they had lost much of their value. The plaintiff is in the habit of selling milk, and of keeping for that purpose a number of milch cows. Those in question would have yielded daily, a clear income of fifty cents each. Moreover, the plaintiff was compelled to employ an attorney to sustain his rights, and to pay him \$35; his attendance to this business occasioned him a great loss of time and labor; his cows had been much neglected, and were much deteriorated in value, so much so, that the evidence goes to fix the deterioration at, at least, \$20 a piece; and after a careful perusal of the record, we have been unable to find any thing which can require our interference. We are satisfied that full justice has been done to all the parties concerned.

Judgment affirmed.

HENRY PARRISH v. WILLIAM CIRODE.

One who designedly represents another as solvent, when he knew that he was not so, and thereby induces a third person to give him a credit, in consequence of which the latter sustains a loss, will be bound to indemnify the party injured by such misrepresentations.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Benjamin*, for the plaintiff. In actions like this the questions for consideration, are: 1. Were false representations made. 2. Was the person making such representations aware of their falsehood, or in a position in which he was bound to know the real facts. 3. Was there damage to the plaintiff. See *Pasley v. Freeman*, 1 Durnf: & East, 61. *Eyre v. Dunsford*, 1 East,

325, 6. *Russell v. Clark*, 7 Cranch, 87. *Upton v. Vail*, 6 Johnson, 182. *Allen v. Addington*, 7 Wendell, 18, 19.

Schimdt, for the appellant.

BULLARD, J. This is an action by which the plaintiff seeks to recover damages from the defendant, for falsely representing his son and son-in-law, composing the firm of Cirode & White, of Mobile, as solvent and worthy of credit; by reason of which false representations, he was induced to sell them merchandize to the amount of about \$1700, which he lost by their insolvency. The plaintiff recovered a judgment for the amount of the goods sold, and the defendant has appealed.

In cases turning principally, if not altogether, upon mere matters of fact, we do not feel it to be our duty to enter minutely into an analysis of the evidence. In the present case we are far from being ready to say, that the court below erred in the conclusion that the conduct of the defendant was designed to deceive the plaintiff, and others, who had dealt with the firm of Cirode & White. He represented them to the plaintiff's clerk as dealing altogether for cash, and as having no bills due, while, at the same time, he had claims against them for a large amount for advances, to secure which, he soon after levied an attachment which broke up their establishment,

But it is contended, that the plaintiff has failed to show that he has lost any thing, not having prosecuted his principal debtors, and exhausted his remedies against them. It is true that, however fraudulent the conduct of the defendant may be shown to have been, the plaintiff cannot recover without showing that he has really sustained damage. The record shows, that Cirode & White are insolvent, and have been declared bankrupts. It further shows, that the defendant levied an attachment on the property of Cirode & White, having previously made oath that they were about to remove themselves and their property out of the State of Alabama; and that the property which they had been enabled to purchase of the plaintiffs, went partly to pay the debt to the defendant, he knowing that the goods had been purchased on credit.

It is ordered, that the judgment of the Commercial Court be affirmed, with costs.

Hill v. Buddington and another.

SAME CASE—ON A RE-HEARING.

BULLARD, J. In the opinion first given in this case we said : "It is true, that however fraudulent the conduct of the defendant may be shown to have been, the plaintiff cannot recover without showing that he has really sustained damage. The record shows, that Cirode & White are insolvent, and *have been declared bankrupts*. In this last assertion it appears we were mistaken, only one of the partners having been decreed a bankrupt under the late act of Congress ; and upon a suggestion of this error, a re-hearing was granted.

We have again reconsidered the whole case, and weighed the arguments adduced to us on the re-hearing. Although only one of the partners is shown to be a *declared* bankrupt, yet the evidence satisfied us, that the firm was insolvent. Its whole property was covered by an attachment sued out by the defendant himself in Mobile, who had previously obtained the greatest part in payment of his own claim, and received a part of the dry goods which the plaintiff, to the knowledge of the defendant, had sold them on credit. Independently of the fact, therefore, that only one of the partners of Cirode & White had been decreed a bankrupt, we consider that the plaintiff has made out his case.

The judgment first rendered will remain undisturbed.

ALEXANDER HILL v. HENRY JOSEPH BUDDINGTON and another.

The holder of a note cannot recover on it, without proving the signatures of previous endorsers by whom he alleges that the note was transferred to him. He might have recovered against the makers, on proof of the endorsement of the payee, without proving the signatures of the subsequent endorsers, had he not set forth such endorsements, and claimed under them.

The holder of a note can strike out at the trial those endorsements only, which have not been stated in the petition.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

Hiestand, for the plaintiff.

Frazer, for the appellants.

MORPHY, J. This suit is brought against the defendants as makers of two promissory notes, drawn to the order of, and endorsed in blank by Thomas Laidlaw. The notes are alleged to have been afterwards endorsed in blank by Osborn Cross and A. Massias. There was a judgment for the plaintiff, from which the defendants have appealed.

Their counsel has asked for a reversal of this judgment, and for one of nonsuit against the plaintiff, on the ground, that he has not proved the signatures of the endorers by whom he alleges the note was transferred to him, and that therefore he has not made out his case. As the endorsement of the payee, Thomas Laidlaw, is proved by a notarial act of sale annexed to the petition, the plaintiff could have recovered under it against the makers, without proving the signatures of the subsequent endorers, had he not set forth such endorsements, and claimed under them. Having done so, he was bound to prove them. It is only those endorsements which have not been stated in the declaration, that the holder has a right to strike out at the trial. Bailey on Bills, 106. The record, which shows no proof of the signatures of Cross and Massias, is certified to us by the clerk and by the judge. The certificate of the clerk does not mention that the transcript contains the evidence given below, while that of the judge certifies, that it does contain all the evidence adduced by the parties on the trial of the case in the first instance. We cannot disregard the latter certificate, and are bound to believe that we have before us all the evidence upon which the case was tried in the lower court. From this evidence the plaintiff does not appear to have made out his case; and yet the judgment appealed from mentions, that the plaintiff has proved all the allegations of his petition. Under these circumstances, we have thought it best not to nonsuit the plaintiff, but to remand the case for a new trial.

It is, therefore, ordered, that the judgment of the Commercial Court be reversed, and that this case be remanded for further proceedings according to law; the plaintiff or appellee to pay the costs of this appeal.

**SUCCESSION OF BERNARD HART—IRMA HART, Administratrix,
Appellant.**

The proper time for the judge to order public notice to be given to the creditors to oppose, if they think fit, an administrator's account, is when he applies for an order to pay the debts of the estate. C. C. 1168, 1169, 1172. It is only when the administrator has funds in his hands, and has made a tableau of distribution, that the creditors can be lawfully called upon to establish their claims contradictorily with each other. But where, at the instance of the administrator, on his prayer for an order to sell the property of the estate, and on the exhibition of a list of its liabilities, the creditors have been notified to present their claims and to show cause why the account should not be homologated, a judgment rendered thereon in favor of a creditor, will be binding on the estate, though it will not preclude any opposition which other creditors may make to the claim when a regular tableau of distribution shall be filed.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

Greiner, for the appellant.

Marsoudet, contra.

MORPHY, J. The administratrix of the estate of Bernard Hart presented a petition to the Court of Probates, praying for an order to sell the property of the estate, and exhibiting a list or account of its liabilities, to show the necessity of the sale prayed for. Notice was given to the creditors of the estate, to show cause why the account should not be homologated; whereupon G. Ducros, in his own name, and P. Marsoudet, as syndic of the creditors of P. R. Colson, made opposition to the account, and prayed to be placed thereon as mortgage creditors of the estate, for the sum of \$625 each, for two notes of that amount drawn by the deceased, to the order of, and endorsed by A. V. J. Jacobs, and secured by the vendor's privilege on property purchased by the deceased. These oppositions having been sustained, the administratrix appealed.

Her counsel has urged that, as the account presented was not a tableau of distribution, but merely a list of the liabilities of the estate, presented for the sole purpose of obtaining an order of the judge to sell the property left by the deceased, the oppositions of the appellees were irregularly and prematurely filed. The order of

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the court below, which was rendered at the instance of the appellant herself, called upon the creditors of the estate to show cause why her account of the liabilities of the succession should not be approved and homologated. The object of this proceeding, we understand, was to make known to the court which is to order the sale, all the claims against the estate, in order to determine what portion of the property it will become necessary to sell to discharge them. We are unacquainted with any law sanctioning a call of the creditors of a succession for this purpose, and at this stage of the proceedings. The proper time for the judge to order public notice to be given to the creditors to make opposition to an administrator's account, seems to be, when an application is made to him for an order to pay the debts of the estate. Civil Code, articles 1168, 1169, 1172. It is only when the administrator has funds in his hands, and has made a tableau of distribution, that the creditors can be lawfully called upon to establish their claims contradictorily with each other. With the oppositions, however, which the appellees have filed, the administratrix cannot find fault, as it was at her own instance that they were notified to present their claims, if they had any, at this stage of the proceedings.

On the merits, the evidence appears to us fully to sustain the judgment by which the opponents were declared to be mortgage creditors of the estate, and ordered to be placed on the account, or tableau to be filed. This judgment we understand to be binding only against the estate. It will not preclude any opposition which the other creditors may think proper to make to the claims of the appellees, when a regular tableau of distribution shall be filed according to law.

Judgment affirmed.

JOHN K. WEST v. HIS CREDITORS.

Decision in *West v. His Creditors*, 5 Rob. 261, affirmed.

An intervenor, who claims property in controversy between other parties, cannot interfere further than to prove his right to the property. He cannot contest the plaintiff's claim against the defendant, nor urge any irregularities in the suit; nor plead exceptions having for their object the dismissing of the action.

A claim belonging to a debtor at the time of his making a surrender of his property under a State insolvent law, belongs to the creditors to whom his property was surrendered, though not placed on his *bilan*, nor given up by him at the time; nor can the insolvent, by subsequently placing the claim on the schedule presented by him on an application for the benefit of the bankrupt law of 19 August, 1841, transfer the claim to an assignee appointed by the bankrupt court. The debtor had no longer any title to the claim, which had been transferred by the cession to the creditors existing at the time of the surrender.

The bankrupt law of 1841 did not suspend the operation of the State insolvent laws, in cases in which proceedings had been commenced before its passage.

The syndic of the creditors of an insolvent having caused a rule to show cause, why a certificate of debt in the hands of the clerk of the court should not be delivered to him to be administered for the benefit of the creditors, to be served on a creditor who had caused the certificate to be seized under execution, the latter objected that the proceeding by rule was illegal. *Held*, that the rule was well taken, the creditor claiming only a privilege or lien on the certificate. Had the latter set up any title to the certificate, and been in possession of it, the proper remedy to recover it would have been by a regular action.

APPEAL from the District Court of the First District, *Buchanan, J.*

L. C. Duncan and *A. Hennen*, for the syndic.

Bradford, assignee, appellant, *pro se.*

Grymes, for *Adelaide West*, appellant.

GARLAND, J. This case was before us in February, 1843, (4 Rob. 89,) and again in June of the same year, (5 Rob. 261.) The first time, it was remanded on the application and appeal of E. A. Bradford, Esq., the assignee of West under the bankrupt law of the United States, who went into the District Court, at the moment the judge was about to sign his judgment, claimed to intervene, and asked for a new trial, which was refused by the court below, and granted by this tribunal, as we supposed the rights of some of the creditors might be affected. As soon as this purpose was attained, by this court pushing the letter and

spirit of the law to its utmost extent, with a hope of doing justice between the parties as speedily as possible,—the assignee, instead of being always ready to exhibit his testimony, as required by article 391 of the Code of Practice, turned about and denied that the court into which he had pushed himself, had any jurisdiction of the case ; and he has joined with the insolvent debtor and his wife, in interposing every obstacle in his power, to the demand set up by the syndic of the creditors on the original *bilan*, who have not, for nearly a quarter of a century, been able to get one cent of their demands. On a plea to the jurisdiction of the court, filed after the cause was returned to the District Court, the assignee succeeded in having the whole proceeding dismissed, which judgment we reversed in June last, for reasons then given, and remanded the case to be proceeded in, according to law.

When the cause was returned to the court below, the plaintiff in the rule, (the syndic of West's creditors,) prayed, that Mrs. West, who alleged herself to be a judgment creditor of her husband, and had made a seizure of the certificate in controversy under an execution against him, should be made a party to the proceeding ; that a copy of the rule, taken originally in November, 1842, should be served on her ; and that she should show cause, why the certificate therein described as issued under the convention between the United States and Mexico, and then in court, should not be delivered to the syndic of the creditors of West, to be collected and administered for the benefit of his creditors ; and it was further ordered that Bradford, the assignee of West under the bankrupt law, and the clerk of the court who has the certificate in possession, should be notified of the trial. To this Mrs. West answered : 1st. That the rule taken on her is so vague and uncertain, that she cannot understand why or wherefore she is made a party thereto ; that she does not know what rights of property or acts of hers are the foundation of it, or are to be brought in question ; nor does it set forth what judgment is prayed for, or intended to be asked in the premises.

2d. That the proceeding by rule is illegal, irregular, and contrary to the practice established by law ; and that if the plaintiff

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in the rule has any claim or demand against her, it should be proceeded in by original petition and suit.

3d. She avers, that the District Court has no jurisdiction of the case, or of the matters therein stated, so far as disclosed, but that the same belongs to the District Court of the United States, sitting in bankruptcy. For further answer she alleges, that the plaintiff has no right to "*the certificate mentioned in the said rule, or to the possession thereof as prayed for;*" wherefore she prays that the rule may be discharged, and she dismissed with her costs.

The intervenor, in addition to his plea of want of jurisdiction formerly insisted on, and again revived, notwithstanding the decision of this court against it, avers: 1st. That this proceeding cannot be entertained in the form of a rule prosecuted summarily, but must be carried on in the shape of a direct action in the ordinary mode.

2d. He avers that Bennett is not the syndic of West's creditors.

For answer, he alleges, that the certificate in controversy is a part of the assets stated on the schedule of John K. West, and surrendered to his creditors when he became an applicant for the benefit of the bankrupt law. That the decree declaring West a bankrupt, has divested him of all right to said certificate, and vested it in him, the assignee. That the insolvent laws of the State of Louisiana have no effect, or operation on the property surrendered on his application to become a bankrupt; and that the assignee appointed by the United States District Court is entitled to the possession of said certificate; wherefore he prays that the same may be delivered to him.

The answer of the clerk of the court, who has the certificate in his possession, admits that fact, and says he has no interest in the matter, and that he is willing to surrender the certificate to whoever is entitled to it. As to the answer of West, against whom the proceedings originally commenced, it is not necessary to state it now, as he is not a party to this appeal.

In the first opinion, we fully stated all the proceedings in relation to West's application for a respite in 1819; its being granted; and the subsequent proceedings of Lloyd & Harrison and others against him, to compel a surrender of what property was left, to

which latter proceeding it appears West assented. The appointment of Bennett as syndic, after the surrender, is also stated, and the subsequent proceedings, up to the time of the issuing of the certificate in question, by the commissioners, sitting at Washington, in the year 1841, under the convention or treaty entered into between the United States and Mexico, relative to the claims of the citizens of the former against the government of the latter.

On the last trial, a certified copy of the original certificate was produced, as well as the original in the possession of the clerk; and on the face of both it is stated, that the claim is "for money, vessel, and munitions of war, furnished to divers Mexican patriots, engaged in the years 1815, 1816, and 1817, in the struggle of Mexico against Spain for the independence and self-government of the former," by West. It was further proved, that West never gave up any property on the forced surrender in 1821, except some accounts and debts mentioned on his books, which were also given up to the syndic of his creditors, and retained by him for a number of years, and then deposited in the hands of another person. On those books, various charges are made for supplies furnished the Mexican government, corresponding very nearly with the accounts laid before the commissioners at Washington, copies of which are in evidence. It is proved, that numerous consultations took place between West and Bennett, as syndic of the creditors, and the counsel of the latter, relative to the claim on the Mexican government. The two latter joined with others in sending an agent to Mexico to settle the matter, about the year 1822, but he was not successful; and finally, all parties were obliged to await the action of the government of the United States and that of Mexico, as there was no other remedy.

In the month of July, 1822, Mrs. West sued her husband for the restitution of her dotal rights, and made Bennett a party to the suit, as syndic of the creditors. He filed an answer denying her claims, and alleging, that all she had brought into marriage had been repaid or restored to her; whereupon, in the month of February, 1823, her suit was dismissed, on motion of her counsel, and never revived, until sometime in the year 1842, when it was recommenced against West alone, and a judgment obtained, upon which execution was issued; and, on the demand of Mrs.

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West's counsel, desiring to know of West, what property should be seized, he gave up the certificate in controversy to the counsel, who had it seized, and it was, with other property, advertised to be sold, in the country, at the plantation on which West lived. About the time this certificate was issued, or shortly previous, a creditor of West's, who lived in Kentucky, had the amount attached in Washington for an old debt; whereupon, West became very active in the defence of the suit, and procured and carried on papers and copies of records, to prove that he had given up the certificate, or demand it represented, to his creditors, and that Bennett was still his syndic. By this means the certificate was released from the attachment, and got into the possession of the counsel of the wife of West, who gave it up to the sheriff as before stated. There is no evidence to show that Bennett has ever been discharged as syndic, and it appears that, until this claim was adjusted, there was very little or nothing for him to administer. The last suit of Mrs. West against her husband, with the judgment, execution and proceedings thereon, were given in evidence; as also the proceedings of West in bankruptcy, in the United States court, which were commenced shortly after his wife had obtained her judgment, and the amount of the certificate in controversy was placed on the schedule, as a part of the assets surrendered. The appointment of the assignee is shown, and the discharge of West as a bankrupt.

The judge below overruled all the exceptions of West, those filed by his wife and the assignee in bankruptcy, and gave a judgment directing the clerk of the court, in whose possession the certificate is, to deliver it to Bennett, the syndic, to be by him administered for the use of the creditors; and West is directed to deliver up all or any other property he possessed at the date of the forced surrender. From this judgment Mrs. West, and the assignee of West have appealed.

As to the various grounds of objection raised by the insolvent, it is not necessary to say anything, as he is not a party to the appeal.

As to the plea to the jurisdiction of the District Court, again raised by the assignee of West, it is sufficient to say, that we have once decided it against him, and see no reason to change

our opinion now, supposing that the party has a right to interpose such an exception to a tribunal into which he has come of his own accord. As to the two other exceptions, we think the judge did not err in overruling them. An intervenor who claims property in controversy between other parties, cannot interfere therein any further than to prove his right to the property. He cannot contest the plaintiff's claim against the defendant, nor urge any irregularities in the suit. 8 Martiñ, 55. He cannot plead exceptions having for their object the dismissal of the cause. 4 Mart. N. S., 488. 5 lb. N. S. 501. 1 La. 434. 3 La. 183.

As to the right of the assignee to claim the certificate of indebtedness on the Mexican government, we are further of opinion, that the court below did not err in rejecting his claim. The evidence shows most conclusively, that this was a debt owing to West by the Mexican government, not only previous to the surrender of his property in 1821, but to his application for a respite in 1819. By refusing, or neglecting to put it on his *bilan* at the latter period, or not surrendering it in 1821, when ordered, he has not acquired any right to it, nor can he, by putting the debt on his schedule when he went into bankruptcy, take it away from the syndic of the creditors, and deprive them of a fund out of which they are entitled to be paid. This debt was in fact as much given up as any other, in 1821. The books in which the entries were made relating to it, were given up; efforts were made to collect it, or get it recognized by the debtor. They were fruitless for a long time, but at last successful. We consider it very immaterial, whether the syndic had only a right of administration under the act of 1817 relating to voluntary surrenders, or a vested right under the act of 1826, which is supplementary thereto. In one capacity or the other, he has a right to the fund, to be applied to the discharge of the debts existing at the time when Lloyd & Harrison's proceedings terminated in a judgment. It is not material to the assignee, whether Bennett recovers as administrator for the creditors under the first cession, or as owner for their use. The fact of putting this certificate and its amount, on the schedule in the United States Court, confers no better title to it than West had. He had none; nor had he possession at the time. When that schedule was made, West had already de-

livered the certificate to the attorney of his wife; and when the assignee was appointed, it was deposited in court under its order. Suppose the syndic had commenced proceedings against the assignee, as it is urged he should have done, the answer at once would have been, that no such certificate was in his possession. The bankrupt law vests in the assignee all the rights and property which the bankrupt owns at the time of his failure, and nothing more. No property can be acquired by a party's going into bankruptcy and putting it on his schedule. If possession should accompany the act, the assignee could hold it until legally divested by the owner; but if not, he must prove his right, which, in this case, he has failed to do. It is possibly true, that the bankrupt law of Congress did suspend all the laws of the State relative to cessions of property; but it certainly applies to cases arising after its passage, and not to estates in a course of administration when it was enacted. The rights of the creditors under the state law were fixed, and must be determined according to it, in all cases where the proceedings were in existence, previous to the bankrupt act.

As to the first exception filed by the counsel of Mrs. West, that she cannot understand why she is made a party, or what is sought from her, &c., we think the court did not err in overruling it. The documents served on her show plainly, that the object of the syndic was to get possession of a certificate of indebtedness held by West, which is sufficiently described, which was for the benefit of the creditors whose claims existed prior to the surrender. Upon this certificate it was discovered, that Mrs. West had some lien or right, by virtue of a seizure under her execution, and it was to enable her to assert her claim, that it was suggested that she should be made a party.

As to the second exception, that the proceeding by rule is illegal, we believe the judge was correct in overruling it. It will be remembered, that in the beginning, this proceeding was against John K. West alone, for the purpose of compelling him to surrender all the property he possessed to the syndic of his creditors. This, in the first opinion we gave, we said was correct; and that no proceedings could be too prompt and summary, to compel a ceding debtor to give up all the property his creditors were

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entitled to have surrendered to them. It was incidental to, and connected with the original proceeding, which is still open, and will so continue, until the syndic renders his account and shall be discharged. If Mrs. West had set up any title to the certificate in question, and had had it in possession, it is clear that the proper remedy to recover it would have been by a regular suit; but as it was seen that only a privilege or lien was claimed, it was thought best to give her an opportunity of asserting it, which she has declined to do, and we shall not decide on it; but this does not affect the original proceeding, nor stand in the way of a judgment.

The exception as to the jurisdiction of the court, is disposed of by what has already been said in this opinion, and in that given in June last. We have no doubt as to the jurisdiction of the District Court, to compel the production of the certificate, and its delivery to the person rightfully entitled to it.

Upon the merits, we have only to say, that as Mrs. West sets up no claim to the certificate in question, but only denies the right of the syndic to recover it, there is no question as to that right. We have stated the evidence very fully, and it is sufficient to convince the most sceptical, that the debt to West from the Mexican government, was owing previously to his failure in 1819 and 1821; and that his then creditors are entitled to the benefit of it as their common pledge, to be regulated by their respective rights and privileges, if any exist.

It is, therefore, ordered, that the judgment of the District Court be affirmed; the appellants paying the costs of their respective appeals.

LOUIS BARTHELEMY MACARTY v. PIERRE LANDREAUX, Recorder of Mortgages for New Orleans.

A mortgage, duly recorded, can be erased from the books of the recorder only by the consent of the mortgagee, or by a judgment decreeing such erasure. C. C. 3335, 3336. It is the property of the mortgagee, and cannot be destroyed by any act of the recorder.

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A mortgagee cannot maintain an action against a recorder of mortgages for damages for the mere act of erroneously erasing a mortgage, where no attempt has been made to enforce the mortgage. As the act of the recorder could not destroy the mortgage, even against an innocent purchaser, who had bought on the faith of a certificate of there being no mortgage on the property, he can be made liable to the mortgagee for such damages only as may result from the fact of the mortgagee's recourse against the mortgaged property being rendered thereby more difficult and expensive. But the recorder will be responsible to the purchaser, for any loss to which he may have been subjected by the error.

The certificate of a recorder of mortgages as to the existence or erasure of mortgages, is only *prima facie* evidence of the facts stated in it.

APPEAL from the District Court of the First District, *Buchanan, J.*

Roselius, for the appellant. This is an action to make the recorder of mortgages responsible for the consequences of erroneously erasing a special mortgage, on certain real property, in favor of the plaintiff. The facts of the case are succinctly set forth in the petition—the granting of the mortgage; its registry; its having been illegally cancelled and erased by the defendant; the sale of the property, subject to the mortgage, to an innocent purchaser, without notice; and the inability of the mortgagor to pay the debt; with other circumstances to fix the liability of the defendant.

To this petition the defendant filed two exceptions: *First*, "that even admitting all the allegations in the plaintiff's petition, no right of action is shown against the defendant; and *secondly*, that, at all events, the action is premature, as the plaintiff has not alleged any unsuccessful attempt to recover his debt, either by personal action against the parties liable, or hypothecary action against the property."

The District Court sustained the second of these exceptions, and dismissed the suit. From this judgment the present appeal is taken. It is difficult to conceive on what ground the opinion of the District Court can be sustained. The judge refers to the 3335th article of the Civil Code, which declares that mortgages can only be "erased, by consent of the parties interested, and having a capacity for that purpose; such consent to be evidenced by a release, or by a receipt given on the records of the court rendering the judgment on which the mortgage is founded." The rule here laid down supports the pretensions of the plaintiff. The plaintiff complains, that the mortgage has been cancelled by the defendant, in violation of this very article of the Code. The liability of the recorder of mortgages for the loss sustained by the plaintiff, in consequence of the mortgage having been improperly erased, is too clear to require argument. Article 3358

of the Code contains an express provision, declaring his liability. The judge of the court below seems to think, that the property originally subjected to the mortgage, may still be seized and sold in the hands of a third possessor in good faith, notwithstanding the erasure and the certificate of the recorder of mortgages. This is a mistake. Conventional mortgages have effect against third persons from the date of their inscription; and it follows, as a necessary consequence, that their effect ceases the moment that inscription is erased. All the facts alleged in the petition must be taken for true, for the purpose of deciding on this exception.

Benjamin, for the defendant. The sole question of law in this case is this: If A possess a duly recorded mortgage on the property of B, can this mortgage be destroyed or erased, so as to affect him, in any other manner than that pointed out by law; and can the fact of the recorder's giving a certificate to B, declaring the property to be free of mortgage, prevent A from exercising his hypothecary action even against C, an innocent third purchaser, who has bought on the faith of the recorder's erroneous certificate?

The defendant maintains, that the mortgage is still in force, and that A's right to pursue the property is unaffected by the mistake of the recorder.

It will be conceded, that A's right to his mortgage is a vested right, from the very moment that he complies with the directions of the law, by causing his mortgage to be inscribed. Civil Code, art. 3314. How can this mortgage be taken from him? The Civil Code, art. 3335, *et seq.*, gives the answer.—Only by his *consent*, or by a *judgment*. In the present case there was neither. The conclusion is irresistible, that the mortgage still exists unimpaired.

That the recorder of mortgages is liable, on the state of facts set forth in the petition, is undeniable—but to whom? The answer is, that he is liable to C, the third person who purchased on the faith of his certificate that there was no mortgage on the property.

This reasoning appears to be unanswerable in principle, and our legislation is in accordance with it. By the Old Code, p. 466, art. 60, the contrary doctrine was sanctioned; but, on revising that Code, our lawyers perceived, that this article was a departure from sound principles, and it was omitted *ex industria*. In the new Code, art. 3357, the recorder is made responsible for "omitting to mention an act existing on the register," which clearly implies a responsibility towards the person who is deceived by the certificate; but nothing is said of his responsibility towards a mortgagee, for irregularly or illegally cancelling a re-

corded mortgage, because such illegal cancelling cannot impair the rights of the mortgagee. In the case of *Dreux v. His Creditors*, 4 Mart. N. S. 630, even under the old Code, this court decided, that a mortgagee did not lose his rank in a *concurso*, because the register omitted to state the mortgage in his certificate. How then has the present plaintiff lost his? Let him pursue his mortgage claim, and he will recover from the third possessor; and in an action by that third possessor we may, and probably shall be able to prove that he *knew the mortgage to exist*, notwithstanding the certificate to the contrary. Of this proof we can take no advantage in the present suit; but it will form for us a complete defence in an action by the third possessor.

Even if the defendant be liable, the plaintiff cannot recover, because his action is premature. *Non constat*, that the debtor will not pay him in a personal action, if brought by the plaintiff; and until that personal action is found to be fruitless, this court cannot say that the plaintiff has suffered any damage.

L. Janin, for the appellant, in reply. Admit for the sake of argument, that the position of the defendant's counsel is true, that the mortgage, erased through an oversight of the recorder of mortgages, is not extinct, but may be enforced by the mortgagee, will it follow that the mortgagee cannot bring a direct suit against the recorder, without having exhausted his recourse against the mortgagor and the property?

It is against the third possessor and the property, that the defendant would force us to proceed in the first instance. He asserts, that we must succeed against the third possessor, and intimates, that if afterwards the evicted third possessor should sue him, it might be shown, that the third possessor had notice of the mortgage. The supposed notice of the third possessor might be a defence on the merits. It is certainly not a matter of exception, under the allegations of the petition. But the petition, the allegations of which must for the present be taken for true, asserts, that plaintiff has lost all right upon the lots: and this negatives the idea of notice in Guesnon's vendee. We must therefore assume the non-existence of such notice.

The case thus stated, presents a clear right of action against the recorder of mortgages. But is it the mortgagee, or the innocent purchaser, that possesses the right of action? If the recorder has any interest in solving this question, it would be in favor of the right of the mortgagee. He would thus be exposed to but one suit; while, if plaintiff should successfully enforce his claim against the third possessor, the recorder would be liable, in a suit by the latter, to the expenses of two suits, and of a judicial sale, &c. The defendant would drive the plaintiff to a circuitry

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of action, without the least benefit to himself. There is no defence which a recorder of mortgages could set up to a suit by the evicted third possessor, which he might not avail himself of in this suit.

Nothing prevents the defendant from calling the third possessor in warranty. The plaintiff has suffered an "injury" (art. 3357) by the fault of the defendant. When about to enforce his mortgage, he is estopped by its erasure. Instead of a simple executory process, he has an intricate, litigated suit, in which several successive purchasers, each with the merits of his individual case, may unite in contending with him. The consequence would at least be delay and expense—an undeniable injury. The plaintiff has a right to be replaced in his original position, and it is but natural that he should proceed against the party who made him lose it, against the party who is in fault, rather than against an innocent purchaser, an innocent sufferer, like himself.

MORPHY J. This suit is brought to make the defendant responsible for the consequences of erroneously erasing from his books, as recorder of mortgages, a special mortgage on real property in favor of the plaintiff. The petition sets forth in substance, that Macarty, Martin Duralde, and Etienne Carraby, sold to P. Guesnon three undivided fourths of twelve lots of ground, the other undivided fourth of which belonged to Guesnon; that, in the division of the notes proceeding from this sale, the plaintiff became the holder of a note of \$2250, drawn by Guesnon to his order, which was secured by a special mortgage on the property sold, which mortgage was duly recorded in the office of Pierre Landreaux, recorder of mortgages for the parish and city of New Orleans; that, at the request of Guesnon, the plaintiff and his co-vendors released and raised this special mortgage, so far as it affected eight of the said lots of ground, but expressly reserved their mortgage on the four other lots; that Pierre Landreaux, instead of erasing the mortgage only so far as it bore on the eight lots described in the act of release, raised and cancelled it absolutely; that, afterwards, P. Guesnon sold the four lots of ground on which the mortgage had been reserved; and obtained from the recorder of mortgages a certificate that the mortgage in favor of the plaintiff no longer existed, by reason and in consequence of which the plaintiff lost the security he had for the payment of his note; that, at its maturity, Guesnon

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paid on account of it \$250, and the interest up to the first of November, 1839, but that he is altogether unable to pay the balance yet remaining due; that if the mortgage on these four lots of ground had not been erased by Landreaux, the plaintiff's security for the payment of his note would have been ample and sufficient; and that, under such circumstances, Landreaux is responsible to the plaintiff in damages, for the amount of the balance yet due to him, for which sum judgment is demanded.

To this petition the defendant filed the following exceptions, to wit:

1. That, even admitting all the allegations of the petition, no right of action is shown against the defendant.

2. That, under any circumstances the action is premature, as the plaintiff has not alleged an unsuccessful attempt to recover his debt, either by personal action against the parties liable, or by hypothecary action against the property. The district judge sustained the second of these exceptions, and dismissed the suit, whereupon the plaintiff appealed.

The liability of the recorder of mortgages to the plaintiff can be maintained only upon the ground, that the latter has lost all recourse upon the property originally subjected to his mortgage, in consequence of its unauthorized erasure, and the delivery of a certificate to Guesnon's vendee, declaring the property to be free of mortgage. The appellee's counsel contends, that such is not the case; that the plaintiff's mortgage is still in force; and that his right to pursue the property is not impaired by the mistake of the recorder. We concur in this opinion.

A mortgage, when duly recorded, can be erased from the books of the recorder only in one of the modes pointed out by law, that is, by the *consent* of the mortgagee, or by a *judgment* decreeing such erasure. Civil Code, arts. 3335, 3336. In the present case there was neither. The vested right which a mortgagee has acquired by the registry of his mortgage, is surely not held at the will and pleasure of the recorder of mortgages. This officer cannot by his own act destroy the mortgage of a party, and substitute to it the guarantee of his personal or official responsibility. He can have no control over a mortgage when it has been duly recorded. It becomes the property of the mortgagee,

from whom it can be taken only in one of the modes pointed out by law. This court has held, that the certificate of the recorder of mortgages forms only *prima facie* evidence of the facts stated in it; that it is not conclusive, and may be contradicted. The mortgagee may show, that the certificate is untrue; that the recorder acted on insufficient evidence, and without his consent; or, in case of an erasure by judgment, that he was not a party to the action brought, or proceeding instituted to cancel his mortgage. 5 Mart. 625. 11 Ib. 526. In such cases, the mortgage, we think, exists unimpaired even against the innocent vendee, who has bought on the faith of a certificate that there was no mortgage on the property. If the latter be evicted, the recorder of mortgages is responsible in damages to him. Article 3357 implies a liability towards the person who is deceived by the erroneous certificate. If nothing is said of the recorder's responsibility towards the mortgagee for illegally cancelling a recorded mortgage, it must be because such illegal erasure cannot impair his legal rights. We are confirmed in this view of the subject, by the suppression in the Civil Code of an article which existed in the Code of 1808, sanctioning the contrary doctrine. It provided, that the immoveables and slaves, in relation to which the recorder should omit in his certificate any recorded mortgages, should remain free of such incumbrances in the hands of the new possessor, saving the responsibility of the recorder, &c. Code of 1808, p. 466, art. 60. This provision of law was entirely left out of the new Code, it appearing no doubt inconsistent with the rights of the mortgagee. It has been urged that, as conventional mortgages have effect against third persons only from the date of their inscription upon the books of the recorder of mortgages, their effect necessarily ceases the moment the inscription is erased. It is true, that it is the enregistering alone, which gives effect to mortgages against third persons; therefore, if a mortgage is not recorded at all, or is recorded for less than its real amount, the mortgage creditor acquires no right as to third persons, except for the amount mentioned in the registry made by the recorder. It was on this principle that we held in the case of *Falconer's Succession*, 4 Robinson, 5, that a mortgage for \$14,000, which through mistake was recorded as being

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only \$1400, was valid and binding as to third persons, only for the latter sum. For omissions or errors committed in the recording of mortgages, the recorder is clearly liable to the creditor, who, through his fault or neglect, is prevented from acquiring a legal right under his mortgage against third persons; but it is otherwise, we think, when a correct registry has been made. Its effect does not cease because the recorder, through error or design has erased it, and delivered a certificate declaring "that it no longer exists." Such acts on his part cannot destroy or impair the vested right of the mortgagee, but they will render him liable in damages to the person who has been deceived by his certificate. If the party whose mortgage has been erroneously erased, could at once sue the recorder of mortgages for indemnity, what would be the measure of such indemnity? The amount of a mortgage cannot always be considered as that of the real loss and injury, which a mortgagee sustains in consequence of its erasure. The property may have fallen very much in value; it may have been originally mortgaged for a sum greatly exceeding its value; it may be subject to other mortgages anterior to that which has been erased, so as to render the latter mortgage of little or no value, &c. Is the recorder, under any circumstances, to pay to the mortgagee the full amount of his claim, that is, much more than he could ever have made out of the property subject to his mortgage? He would be liable, we apprehend, only for the loss really sustained. Upon the whole, we are by no means prepared to say, that the plaintiff has lost all recourse upon the property mortgaged to him. It is true, that his recourse may have been rendered more difficult and expensive, in consequence of the acts of the defendant. Such damages as he may sustain in consequence thereof, he will probably be entitled to recover; but these can be ascertained only after he shall have pursued his mortgage claim. He cannot as yet be said to have suffered any loss; and cannot, therefore, maintain the present action.

Judgment affirmed.

JOHN DUNCAN and others v. WILLIAM T. BARNARD.

Where a draft, drawn by one as agent for a succession, was accepted, on the faith of the succession and not of the agent personally, for the purpose of raising funds for the purchase of supplies for a plantation belonging to the succession, for the use of which the proceeds were applied, and the authority of the agent to contract for the succession is not denied, the agent cannot be made personally liable for the draft. The acceptance of the draft is an admission of the agent's right to draw in that capacity, and throws on the acceptors the burden of proving the want of authority.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Finney*, for the plaintiffs. The defendant is personally responsible as the drawer of this bill, accepted for his accommodation. Any one who intermeddles with the affairs of a decedent's estate, who is neither executor nor administrator, is chargeable with the debts of the estate, so far as assets come into his hands. 2 Black. Com. 507, 508. And the drawing a bill is an admission of assets. Bayley on Bills, 76, notes O, and 53, 54. Any one who draws a bill of exchange in the name of another person, whether natural or legal, from whom, or from which he has no authority to do so, is personally responsible.

Trustees, guardians, executors and administrators, and other persons acting *en autre droit*, are personally liable on bills of exchange, because they have no authority to bind the persons, or the estates they represent; and hence, to give any validity to the draft, they must be deemed personally bound. And should an executor or administrator draw, endorse, or accept a bill, in his own name, adding thereto the words, "*as executor*" or "*as administrator*," he would be personally responsible thereon. They may exempt themselves from personal responsibility by clearly expressing in the instrument, that the money is to come out of the assets; but, in the absence of this most unequivocal expression, they will be bound personally. Story on Bills, 89, 90. Bayley on Bills, 76, and notes. Chitty on Bills, 36, note 1, Am. ed. of 1821. 6 Mass. R. 58. 5 Mass. R. 299. 2 Brod. & Bing. 460.

If an executor or administrator, who draws a bill in that capacity, binds himself personally for want of authority to bind the estate, *a fortiori*, does one bind himself personally, who draws a bill as representative of an estate which he has no authority whatever to represent in any manner. The reason applies with much greater force.

Wharton, for the defendant and intervenors.

BULLARD, J. This is an action instituted by attachment against William T. Barnard, to recover of him six hundred and thirty-four dollars, a balance of account for advances made by the plaintiffs, according to an account annexed to the petition. The account referred to appears to be one against the estate of W. Barnard, of which it seems the present defendant is one of the heirs, and who was acting as manager on a plantation belonging to the estate. The account is credited by the nett proceeds of a draft for \$805 45, drawn upon the plaintiffs, and signed, "Estate of W. Barnard, per William T. Barnard," and when taken up, the full amount is charged to the same account. This draft was drawn, accepted, and negotiated, in order to put the plaintiffs in funds for the furnishing of supplies to the plantation belonging to the estate. The amount of the draft, less the balance of \$170 14, on a previous account in favor of the estate, forms the amount sued for.

Twenty-eight bales of cotton were attached as the property of the defendant, in the hands of Yeatman & Co. The Planters Bank of Tennessee intervened, and claimed the cotton as its property. Judgment was rendered for the plaintiffs, and both the defendant and the bank have appealed.

The defendant, Barnard, in his answer, denied that the cotton belonged to him; and he further pleaded, that the account sued on, is against the estate of W. Barnard, and that suit against an estate, cannot be brought by attachment; that he is one of three heirs, and if bound, is only so jointly, and consequently that the other two heirs ought to be cited.

It has not appeared to us important to determine to whom the cotton attached belonged at the moment the attachment was sued out, being of opinion, that the last plea of the defendant must prevail. It appears to us clear, that the draft was accepted on the faith, not of the defendant personally, but on that of the estate, in whose name it was drawn, and for whose use the proceeds were applied.

But the plaintiffs' counsel contends, that the defendant is personally liable for the full amount of the draft accepted for his accommodation; because, first, any one who intermeddles with the affairs of a decedent's estate, who is neither executor, nor admin-

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istrator, is chargeable with the debts of the estate, so far as assets come into his hands, and the drawing a bill is an admission of assets; and that any person who draws a bill without authority, makes himself personally liable.

The principle here invoked, applies to creditors of the *deceased*, and not to such as became creditors of the *heirs*, or of the estate, after his death. The defendant cannot be said to be in any just and legal sense of the word, executor *de son tort*, in relation to a creditor who became so by a contract with himself, with knowledge of all the circumstances under which he contracted. The draft was drawn by the estate, through the agency of the defendant. If the plaintiff had been deceived, and it were shown that the defendant was without authority to draw, he might be held personally liable. But such is not the case. His authority to contract for the estate, so far as regards supplies for the plantation, is not denied. The acceptance of the bill by the plaintiffs, is an admission of his right to draw in that capacity, and throws the burden of proof upon them to show a disavowal of his power to bind the estate.

We are, therefore, of opinion, that the plaintiff cannot recover in the present form of action.

It is, therefore, ordered, that the judgment of the Commercial Court be reversed, and that ours be for the defendant, as in case of nonsuit, with costs in both courts.

LUCRETIA WADE and Husband v. THE NEW ORLEANS CANAL AND BANKING COMPANY.

The destruction of a bank-note by fire, or otherwise, does not destroy the obligation of the bank to pay.

Where in an action against a bank for the amount of notes alleged to have been destroyed by a fire which consumed the residence of plaintiff, the evidence leaves no doubt of the destruction of the notes, plaintiff will be entitled to a judgment for their amount on the condition of executing a bond, with surety, to indemnify the bank, in case it should afterwards appear that the notes were not so destroyed.

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APPEAL from the District Court of the First District. *Buchanan, J.*

C. M. Jones and L. Pierce, for the plaintiffs.

F. B. Conrad, for the appellants.

BULLARD, J. This is an action against the Canal Bank, in which the plaintiffs seek to recover two thousand and fifty dollars, the amount of twenty *one hundred dollar notes*, and one *fifty dollar note* of the defendants, which, it is alleged, were consumed by the fire which destroyed the dwelling house and furniture of the plaintiffs, in the month of July, 1842. Judgment was rendered in the Commercial Court in favor of the plaintiffs, and the bank has appealed.

It is incumbent on the plaintiffs, in a case like the present, to furnish very strong and conclusive evidence of the destruction of the bank notes by fire. The only defect in the evidence is, the want of identity, by numbers and dates. Is that defect supplied by such strong concurrent circumstances as to leave no reasonable doubt of the fact alleged? If so, equity forbids that the bank should profit by the destruction of their notes, at the expense of the plaintiffs.

It is clearly shown, that Mrs. Wade received, in March and April, 1842, from the Canal Bank, the amount claimed by her, on two checks, the one for \$1000, and the other for \$1050. It was paid to her in bank notes of the Canal Bank. When the run took place upon the bank, she endeavored to get the specie, but the teller told her the sum was so large she ought to wait till the next day. The next day, June 1, 1842, the bank suspended specie payments. She afterwards consulted an officer of the bank as to what she should do—whether she should part with her money at a discount, or keep it. The amount is shown to have been in her possession immediately preceding the fire. It was kept in her *armoire* in her sleeping room, together with some gold and silver and a gold watch, and was placed in a silver basin. After the fire, a mass of melted silver and gold was recovered from the ashes immediately under the room, which was entirely destroyed with all the furniture, and Mrs. Wade narrowly escaped by mounting upon the roof of the house, and was much injured by the fire. The fire broke out in the kitchen, under the

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room in which Mrs. Wade slept with two children and some servants, about day-light in the morning. The whole house was consumed, together with all the furniture, except some in the parlor.

Mrs. Wade was very much injured, and was confined several weeks with her burns. As soon after the fire as her physicians would allow her to see visitors, she stated to a person who called on her, and who was examined as a witness, that she had lost all that she had; that she had lost a gold watch which belonged to her daughter; and she spoke of the \$2050 in notes of the Canal Bank, and other bank notes which had been consumed. The witness made a memorandum of what she had lost, and told her he had no doubt the bank would pay her. Among the ashes was found not only gold and silver that was melted, but \$400 or \$500 in specie, which was not melted, and that directly under the place where the plaintiff's sleeping-room was situated. It is further shown, that there is yet in circulation of the same issue about \$16,000 in \$100 notes, which were put in circulation by the bank, previously to the fire.

A critical examination of all the evidence given on the trial has not enabled us to detect a single circumstance tending to create any suspicion. It is quite conclusive, that the fire which consumed the house, destroyed the bank notes, as alleged in the petition, and that it is impossible they can ever be presented for payment to the bank. It would even have created suspicion, if the plaintiff had retained, and been prepared to prove by a witness, the numbers, letters and dates of the identical bills kept by her in her *armoire*, and alleged to have been destroyed. Such precautions are quite unusual. Her retaining the notes so long is accounted for by the fact, that they were at that time at a heavy discount, and that she had been advised by an officer of the bank not to submit to a sacrifice. Three days before the fire, she had offered to lend the money for two or three months to be re-paid in good money. The plaintiff was ruled to give bond, with surety, to indemnify the bank, in case it should appear hereafter that the notes were not destroyed; and this could only be shown by the fact, that when the old issue shall be called in, the whole shall be presented for payment. The bank is thus amply protected from any future loss.

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The destruction of a bank note by fire, or otherwise, does not destroy the obligation of the bank to pay. Every note it has put in circulation is, in contemplation of law, still due by the bank. The difficulty consists in procuring such clear and satisfactory evidence of the loss, as to place the bank beyond the reach of ultimate loss or imposition. In the present case, the evidence leaves no doubt on our minds of the total destruction of the notes, as set forth in the petition.

Judgment affirmed.

 LEWIS BROWN v. THE MECHANICS AND TRADERS BANK OF
NEW ORLEANS.

Payment by the drawees of the original of a bill, drawn in duplicate payable to order, made under a forged endorsement, is no defence to an action by the payee, against the drawer, on the protest of the duplicate for non-acceptance. The payment made on the forged endorsement was at the risk of those who made it.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Van Matre*, for the plaintiff, cited Chitty on Bills, (7 Am. ed.) 61, 149, 110, 389, 385. 2 Starkie on Evid. 245, 650. *Dick v. Leverich*, 11 La. 576. *Jackson v. Commercial Bank*, 2 Rob. 128. 1 Bullard & Curry's Dig. 41.

L. Peirce, for the appellants.

BULLARD, J. This is an action upon the duplicate of a check, or bill of exchange, drawn by the Mechanics and Traders Bank, to the order of the plaintiff, upon the Chemical Bank of New York, and protested for non-payment.

The defendants, in their answer, deny that the plaintiff, is the owner of the draft, or entitled to sue. They deny that they are liable to pay it, without production or tender to them of the original; and they say, that they have been informed, and believe, that the Chemical Bank has the original of said bill, and has paid the same. They, therefore, pray oyer of the original before further proceedings, and if the same be not produced and deliv-

ered to them, they pray judgment whether they are bound to make further defence, and pray to be dismissed. This exception being disposed of, the defendants answered to the merits, after denying the right of the plaintiff to recover without producing the whole set; and averred, that the first was paid by the Chemical Bank on presentation.

The plaintiff recovered a judgment for the amount of the bill, and the defendants have appealed.

The evidence clearly shows, that the defendants drew the bill in duplicate; that the first was remitted to the plaintiff, who resides in Missouri, but was never received by him. It was intercepted, the name of the plaintiff forged upon the back of it, and was presented and paid by the Chemical Bank. In the mean time, the other duplicate, upon which the present action is brought, was received by the plaintiff from his agent in New Orleans, but on presentation by him, payment was refused, and a regular protest made; whereupon the present action was brought.

The defendants have failed to make good the plea of payment by the bank on which the bill or check was drawn. The payment having been made upon a forged endorsement, was at the peril of the bank making the payment.

With such evidence, the Chemical Bank could not recover of the Mechanics and Traders Bank the amount of the bill. The loss must fall on the former. Nothing then has been shown to exonerate the defendants from their liability to pay on the protest of their bill, inasmuch as the payment on the forged endorsement would not have protected the Chemical Bank, if they had accepted, and the action were against them as acceptors. But it is contended by the counsel for the defendants, that this action is premature; that the plaintiff should have first instituted proceedings against the Chemical Bank for retaining the check alleged by him to have been paid in error, and, on proving the forged endorsement, to have had it returned to him or paid. To this the obvious answer is, that the plaintiff had no right of action against the Chemical Bank, until after acceptance; and, that being refused, his recourse was upon the drawers. Even admitting that the plaintiff is bound to account for both the duplicates,

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which is by no means clear, yet he has sufficiently accounted for the first, by showing its loss, and its payment on a forged endorsement. With the same evidence now adduced, the Chemical Bank could not be allowed to charge the defendants with the amount of the draft thus incautiously paid.

Judgment affirmed.

WILLIAM MONTGOMERY and another v. CHARLES LEVISTONES.

The possession by the creditor of property of the debtor, with the consent of the latter, for the purpose of paying himself out of its hire, is an acknowledgment of the debt, interrupting prescription.

Where a debtor acknowledges a debt and asks for indulgence, it is a tacit renunciation of any prescription which may have been required. C. C. 3424.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Rawle*, for the appellants.

Elwyn, for the defendant.

MORPHY, J. The defendant is sued on a note made at Savannah, on the 29th of October, 1835, by which he promised one day after date to pay to Joseph Cumming the sum of \$5000. The note was endorsed by the payee to Joseph Cumming & Co., who transferred it to the petitioners. It is alleged in the petition,* that the defendant, within five years, has frequently acknowledged and promised to pay said note; and, on the 1st of May, 1840, did pay on account thereof, the sum of \$3457 93, thus leaving due a balance of \$1542 07, for which judgment is demanded, with interest at seven per cent from the 1st of May, 1840. The answer pleaded the general issue, and set up the plea of prescription. This plea having been sustained below, the petitioners have appealed.

The evidence shows, that Levistones had left in the possession of Joseph Cumming, some negroes and jack-screws, the hire of which was by agreement to be applied to the reduction and pay-

* The petition was filed on the 1st April, 1843.

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ment of this note. The account for the hire was annually made up, and sent to the defendant, who acknowledged the receipt thereof. As the sums received, which formed a great many items, could not be endorsed separately on the note, they were noted down in an account in the books of Cumming & Co., who, on the 1st of May, 1840, made an endorsement on the note, by which they acknowledged to have received \$3457 93 on account of it, with interest up to that date. Why Cumming & Co. did not continue to receive, after this time, the hire of the slaves in payment of the note, or what became of the slaves, the record does not inform us. On the 1st of February, 1841, Joseph Cumming & Co. wrote to the defendant, requesting him to pay on his note to them \$1000 to W. & J. Montgomery, and wishing him to say what he could do in the matter, &c. To this letter, the defendant, after acknowledging its receipt, replied in the following terms: "With the matter of Montgomery's, nothing can be done at this time. We are free to confess things have not gone on as we expected, and must for a time be indulged. The subscriber has lost heavily by the falling of stocks, property, and people's failing, but is in hopes all will in time be honorably settled. I assure you, that the services that have been rendered me cannot be forgotten, nor are we ungrateful, as hereafter may be proven. What other men say is of no consequence, as nothing but *honor* and *honesty* is our motto." It is shown that, at the date of this answer, the note sued upon was in the possession of the plaintiffs, and they had no other claim or business with the defendant.

It is clear, that the holder of a note cannot, by any endorsement he may make upon it, interrupt prescription, without the knowledge or consent of his debtor; but in the present case, the receipt, or endorsement on the note can hardly be considered as made entirely without the assent of the defendant. It was a credit given for a number of small payments made during several preceding years, with the knowledge and express consent of the defendant, and out of the hire of property which he had left in the possession of his creditor during that time, as a security for the payment of his debt. This possession of the defendant's property by Cumming & Co., for the purpose of being paid with

the hire which might be derived from it, was a standing acknowledgment, on the part of the defendant, of his indebtedness. It prevented prescription from running, in the same manner as, in the case of a pledge, prescription does not run as long as the thing pledged remains in the possession of the pledgee. Every successive payment moreover, made out of the hire of the defendant's property under his agreement with Cumming, operated as an interruption of the prescription. 2 Troplong, Nos. 534, 618. 1 Rob. 557. But even if the circumstances above stated created no interruption or suspension of prescription, it appears to us, that the defendant's letter of the 13th of February, 1841, contains, on his part, a renunciation of any prescription that might have been acquired. "Tacit renunciation," says the Civil Code, art. 3424, "results from any fact which creates a presumption of the relinquishment of the right acquired by prescription." Notwithstanding some vagueness in his language, the defendant, in his reply to the letter of Cumming & Co., clearly acknowledges his indebtedness, craves the indulgence of his correspondents, and expresses his hope that in time all would be honorably settled. This answer is inconsistent with the idea that he intended to avail himself of any right acquired by prescription; but, on the contrary, implies that he expected to settle this debt honorably, and only wanted some indulgence in consequence of the losses he had experienced. This case can hardly be distinguished from that of *Shiff v. Hertzogg*, in which indeed the language used by the debtor was more explicit and positive, but to the same effect. 12 La. 455. There is evidence in the record, that the legal rate of interest in Georgia is eight per cent per annum, and that, when not otherwise expressed in the note, it runs from the time it becomes due; but the petition claims interest only at the rate of seven per cent.

It is, therefore, ordered, that the judgment of the Commercial Court be reversed, and that the plaintiffs recover of the defendant the sum of fifteen hundred and forty-two dollars and seven cents, with interest at the rate of seven per centum per annum from the 1st of May, 1840 until paid, with costs in both courts.

THE SECOND MUNICIPALITY OF NEW ORLEANS v. WILLIAM
H. MARTIN.

Where the record contains no statement of facts, bill of exceptions, or assignment of errors; and it is not certified by the judge as required by art. 586 of the Code of Practice, and the certificate of the clerk does not show that it contains all the evidence introduced on the trial below, the appeal must be dismissed.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* This was an appeal by the defendant from a judgment in favor of plaintiffs, for the cost of certain paving done in front of lots owned by the defendant.

Rawle, for the plaintiffs.

Culbertson, for the appellant.

SIMON, J. The record in this case does not contain any statement of facts, bill of exceptions, or assignment of errors. It is not certified by the judge, according to article 586 of the Code of Practice; and the clerk only certifies that it contains a transcript of all the proceedings, as well as of all the documents filed in the cause, wherein Municipality No. 2 is plaintiff, and William H. Martin is defendant.

The insufficiency of the clerk's certificate precludes us from examining this case on its merits, and compels us to dismiss the appeal.

Appeal dismissed.

THE SECOND MUNICIPALITY OF NEW ORLEANS v. JEAN
LAURELLE.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
Rawle, for the plaintiffs.

Culbertson, for the appellant.

SIMON, J. The clerk's certificate is exactly in the same words as that in the case of *The Second Municipality v. Martin*, just disposed of; and in the absence of any statement of facts, bill of

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exceptions, or assignment of errors, or of the judge's legal certificate, is insufficient to enable us to examine the case on its merits.

Appeal dismissed.

SAMUEL KOHN v. JOHN HALL.

There must be an express stipulation in a contract of sale, to render joint purchasers liable, *in solido*, or as sureties for each other, for the price. Such liability cannot be presumed.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

T. Slidell, for the appellant.

Benjamin, for the defendant.

BULLARD, J. The plaintiff represents, that he was formerly the owner of certain city lots, which, together with some other property, he sold by act before Stringer, a notary, on the 12th November, 1831, to Joshua Baldwin, retaining a mortgage to secure the payment of certain notes given for the price. That Baldwin afterwards sold the lots to the defendant Hall, and to G. W. Pritchard, J. D. Bein, and R. Bein, who, by the notarial act of sale to them, assumed to pay the original price then outstanding and due to the plaintiff. He states, that there is yet a balance due him, after crediting the amount for which the lots were sold by the sheriff, under his mortgage; which balance he alleges is owing by the defendant Hall; and he prays for judgment accordingly.

The defendant at first set up, by way of exception, that the *assumpsit*, as stated in the petition, implied only a joint obligation, and that the action could not be maintained against him without making the other obligors parties to the suit. The plaintiff was then permitted to amend, and the representatives of Pritchard, J. D. and R. Bein, were made parties defendant. The court gave judgment against Hall for one-fourth of the balance due, and the plaintiff has appealed.

The case has been submitted, without argument, upon a single

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point of the appellant's, that the judgment ought to have been for the full amount of the balance of the price of the lots, due to the plaintiff.

We concur with the learned judge of the Commercial Court, that the defendant is bound, at most, for one-fourth. He acquired but one undivided fourth of the lots, and was liable for only one-fourth of the price, unless he became either expressly surety for his co-purchasers, or bound *in solido*. Neither can be presumed.

Judgment affirmed.

FRANÇOIS GERBER v. SALVADOR VIOSCA and another.

Where one employed by the lessee of a market to collect his dues, but not to superintend its police, causes a person to be arrested for making a disturbance in the market, the act not being within the scope of his authority as agent, cannot subject the principal to damages for any injury resulting therefrom.

A judgment of nonsuit in a prosecution in the name of the city, instituted before a magistrate for the recovery of the fine imposed for a disturbance of the public peace, is not conclusive evidence, in an action for false imprisonment, against the parties at whose instance the plaintiff was arrested.

APPEAL from the District Court of the First District, *Buchanan, J.*

Grivot and Castera, for the plaintiff.

Latour, Preaux and Bodin, for the appellants.

BULLARD, J. This is an action for false imprisonment. The plaintiff states, that he was attending to his business, that of a butcher in the market, when Manzoni wrongfully told him to leave his stall, and was about to turn him out, when one Lanatta, the agent of the defendant Viosca, who is the farmer of the butchers' market, came, and under pretence that the petitioner was making a great scandal, asserted that he had a right to expel him from the premises, and so he and Joseph Prados took him forcibly, and confined him in jail. The action is against the principal Viosca, and Prados, who was acting in the market as a police officer. The jury gave a verdict for \$500, which the

court refused to set aside; and from a judgment rendered thereon, the defendants have appealed.

The evidence does not show any cause of action against Viosca. Lanatta in provoking or procuring the arrest of the plaintiff by a commissary of police, cannot be said to have been acting within the scope of his authority as agent of Viosca. It appears to have been his business as agent to collect the market dues, and not to superintend the police of the market. He acted on his own responsibility, when, under the impression that the plaintiff was creating a disturbance in the market, he called upon the commissary to interfere.

It appears, that the plaintiff had been occupying for some time a stall in the market, which he had hired of Manzoni. On the morning on which this arrest took place, Manzoni came very early, and took possession of the stall. On the plaintiff's arrival he found himself dispossessed, and meat belonging to Manzoni on his table. He inquired to whom the meat belonged, and Manzoni replied that he was the owner. The plaintiff requested him to take it away, but he refused. He repeated the request, and was again refused; whereupon Gerber pushed the meat on one end of the table, and Manzoni shoved it back. This operation was repeated, and then the plaintiff threw the meat upon the ground. Manzoni went for Lanatta, who came and afterwards went away, and after some time came back with Prados, and took the plaintiff into custody. One witness, who tells us that the trade of a butcher has been hereditary in his family for two hundred years, testifies, that the thing passed off very quietly, but that if a large fly goes through the market it would occasion a noise.

Thus it appears the whole matter grew out of a petty squabble about the possession of a stall. If Manzoni was wrong in dispossessing the plaintiff, the latter ought to have sought redress in a legal manner, and not have endeavored to take justice into his own hands, by throwing the other's meat upon the ground.

Prados appears to have acted without malice and with probable cause, and as commissary of police, ought not to be amerced in damages, except for a clear abuse of his authority. The ordinance of the 20th of July, 1840, provides, that if any person shall, in the day time, *commit any noise or disturbance* at any public place,

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he shall be fined not more than twenty, nor less than three dollars for each offence. The plaintiff, it appears, was prosecuted before one of the city judges under the ordinance in the name of the Municipality, and judgment of nonsuit entered, and a record of the proceedings was read in evidence. That judgment clearly does not conclude the defendants, much less does it prove that, as it relates to Prados, he acted without probable cause.

We conclude that the plaintiff has failed to make out his case.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that ours be for the defendants, with costs in both courts.

ETIENNE LAMORANDIER v. CHARLES MEYER and another.

Notice to the debtor of the seizure of his property under a *fi. fa.* is indispensable, whether the debtor resides within the parish in which the property is situated, or not. C. P. 654, 655, 667.

The statement in the return of a sheriff on a *fi. fa.* under which property has been sold, that notice of the seizure was sent by mail to the sheriff of the parish in which the owner of the property resided to be served, is not alone sufficient evidence of the service of notice.

Where the debtor, or other person interested, opposes the homologation of a sale, under execution under the stat. of 10 March, 1834, the burden of proving a compliance with the formalities required by law, is on the party who applies for its homologation. The return of the sheriff on the execution does not throw on the opponent the burden of showing that the formalities of law have not been complied with.

APPEAL from the District Court of the First District, *Buchanan, J.*

Hamner, for the plaintiff. The return upon the *alias fi. fa.*, and the sheriff's deed, show that all the formalities of the law have been complied with; and this is sufficient to sustain plaintiff's title unless rebutted by positive evidence. *Lafon v. Smith et al.* 3 La. 476.

The opponents have produced no sufficient evidence to establish their objections. The proof is upon them. 4 La. 476. They have not made probable, or more than probable, what they ought to have made certain.

A demand of property was made of the opponents before the

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seizure,—see the return upon the *fi. fa.* But though it were not made, the seizure would be still good, as a demand was not necessary. 16 La. 275. Plaintiffs had a mortgage upon the property seized, and had a right to seize. Code of Pract. arts. 648, 646.

The opponents complain, that there was no notice of seizure. But there was notice, and to appoint appraiser. The law does not require that a return should be made into court, upon a notice of seizure. The statement of the sheriff in the return on the *alias fi. fa.* is sufficient, unless the reverse is shown. This return shows, that the sheriff acted in good faith, and that defendants were non-residents of his parish; and to do more than he did, was a legal impossibility.

But, under the circumstances of this case, notice was unnecessary, because it was *legally impossible*. The opponents resided out of the parish, and the sheriff of St. Landry could not serve the notice. Code of Pract. art. 761. The sheriff of the District Court of this district was equally unqualified to serve it, for it was not a *judgment or order of a court*. Ibid. art. 760. Had the latter officer served the notice, it would not have been of any legal validity. Our law has made no provision for notice in such a case as this. The duty of giving notice, is only required in case the party is domiciled in the parish. Code of Pract. art. 654.

Preston, for the appellant. A *feri facias* was issued from the District Court of the First District to the sheriff of St. Landry, who seized and sold a tract of land belonging to the defendants. It was the duty of the sheriff as soon as he received it, to seize the defendants' property, and "give notice in writing to the debtor, and to annex thereto a list of the property seized, which he shall deliver to him in person, or leave at the place of his ordinary residence." Code of Pract. art. 654. The same formalities precisely must be pursued, even where the property is mortgaged to the plaintiff. Code of Pract. art. 745. Unless this notice is given the sale will be null. 6 La. 631.

The sheriff of St. Landry did not serve the notice of seizure in the present case on the defendant in person, or leave it at his place of residence, as appears by the return. He sent the notice to the sheriff of this District Court. That sheriff has made no return of it; does not recollect any thing about it; but was in the habit of giving such notices to the sheriff of the parish of Orleans. The latter has no recollection of it.

What is done on an execution necessary to make a sale legal, must appear by the return. Code of Pract. arts. 642, 700. The return does not show that the notice of seizure was served on the defendant, and the verbal proof shows, that it was not.

And this notice is essential to make the sale, otherwise it would be made without the debtor's knowledge, and without any opportunity to prevent it, by payment, or any other means.

To prevent a debtor's property from being absolutely sacrificed by a rapacious creditor, the law requires its appraisement before sale, and that the owner should be summoned to appoint an appraiser. Code of Pract. art. 671. Act of 25th March, 1828, sec. 10. Nothing shows that this notice was given, and the property was sacrificed from the failure of the plaintiff to have this requisite of law complied with.

There is no doubt, that if the sheriff of the District Court had served the notice of seizure, and summons to appraise, on the defendant, and returned it into court, this would have been legal. The District Court would have ordered him to do so if he refused, in order that the sale of property might not be made, *ex parte*, without the owner's knowledge. But the proceedings to sell property must appear in writing, and by the return of the sworn officer.

Authorities are quoted which support a sale, made by the sheriff on a general return of compliance with the requisites of law. But these decisions were made before the monition law of 1834 was passed. That law was passed to enable the plaintiff to prove that the formalities of law had been complied with, and to have his title forever quieted. The *onus probandi*, from the very nature of the law, rests upon him. It is not for the defendant to prove that the requisites of law were not complied with. It is an enabling law for the plaintiff, and entitles him to a judgment of homologation, on his proving, in a legal manner, every thing that is denied in the opposition to the monition.

If no means could be devised by which the debtor could be notified of the seizure and sale of his property, the court would have appointed, and sworn a curator, *ad hoc*, contradictorily with whom the executory proceedings could be carried on, rather than that they should be *ex parte*.

GARLAND, J. E. Lamorandier, *fiis*, having obtained a judgment against the defendants, issued an execution out of the District Court of the First District, directed to the sheriff of the parish of St. Landry, where the two tracts of land are situated which were sold by the plaintiff to the defendants, the price of which formed the consideration of the notes sued on, and on which a special mortgage was retained to secure the payment of said notes. The defendant Meyer, is a resident of the city of New Orleans, and Zimpel resides in parts unknown, but was supposed to be represented in New Orleans by F. Frey, who has

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his power of attorney unrevoked. Upon the receipt of the writ, the sheriff proceeded to seize all the right, title, and interest, of the defendants to the land mortgaged to the plaintiff, "and notified the said Charles Meyer, and Frederick Frey, attorney in fact for Charles F. Zimpel, both living in New Orleans, enclosed in a letter to the sheriff of the first judicial district, New Orleans, for service of such seizure, of the day when said property would be offered for sale, and to attend and name an appraiser. Advertised said property according to law, to be sold for cash, at the court-house, in the town of Opelousas, on Monday, the 4th day of October, 1841." The seizure was made on the 28th day of the month of August previous. The return then proceeds to state, that the property was appraised by appraisers, chosen for the plaintiff and defendants, who were duly sworn, and that, after appraisement, it was sold for two-thirds of its value to the plaintiff, E. Lamorandier, *fils*, and Decoudray Lamorandier, to whom a deed was made by the sheriff in due form, and regularly recorded.

The aforesaid purchasers applied to the District Court of the First District for a monition, under the provisions of the act of March 10, 1834, setting forth all the foregoing circumstances. The application for a monition was advertised in the newspapers, and in due time Meyer, one of the defendants, made opposition to the homologation of the sale; because, as he avers, the property was not legally seized, nor any demand made, nor notice of seizure given to the opponent; and because the land was not duly advertised for sale, nor appraised, nor any of the legal requisites complied with.

Upon the trial, the applicants for the monition produced the execution and return thereof, and the sheriff's sale, also the newspapers in which the application was published. The opponent introduced as a witness F. Frey, who stated, that he had formerly been the attorney in fact of Zimpel, but did not then consider himself as such, nor was he so at the time the notice purported to have been given, although the power had never been revoked. Thielen, the sheriff of the District Court, says, that he has no recollection of ever having received any such notice as the sheriff of St. Landry mentions as having been sent to him. The

sheriff of the parish of Orleans was also examined, and testified, that he had no recollection of ever having received any such notice. There is in fact no evidence of a notice of seizure, other than the mere declaration of the sheriff of St. Landry, in his return, that such notices were sent by mail to the sheriff in New Orleans, to be served; but whether they were received or served, is not shown.

The judge, in his judgment, says, "that as it is not shown, that the formalities required by law for the sale of property seized under execution in this case were not complied with, the return of the sheriff creates a *prima facie* presumption of regularity in the proceedings, which throws the burden of the proof to the contrary on the party opposing." The judge further says; "that the notice by a sheriff making a seizure under execution, to the party in the cause to appoint appraisers, is only to be considered applicable to those cases where the party to be notified resides within his bailiwick;" wherefore he homologated the sale, and from that judgment Meyer has appealed.

Articles 654 and 655 of the Code of Practice are peremptory as to a notice of seizure being given to the debtor, with a list of the property seized. Article 667 also requires a notice; and, although no particular mode is pointed out by the Code how it shall be served, when the debtor resides in a different parish from that in which the property is situated, yet we cannot agree with the district judge that no notice is necessary, when the judge resides in a different "bailiwick" from that in which the sheriff exercises his authority. As to the mode of giving the notice, the sheriff of St. Landry seems to have adopted a very reasonable one, in sending it to the sheriff of the District Court of the First District to be served, the debtor residing in his "bailiwick," and the process having issued from that tribunal. Nor can we concur with the district judge in his opinion, that when a debtor, or defendant, opposes the homologation of a sale made under execution, he must show that the formalities of the law have not been complied with, and that the *onus probandi* is on the opponent. We think it is the duty of the plaintiff in the monition, to prove a compliance with the legal formalities; and that not being proved in this case, we think the court erred in homologa-

 Moreau v. Chauvin and another.

ting the sale, as to the opponent Meyer. The other defendant, Zimpel, not having opposed the sale, nor appealed from the judgment rendered, we cannot decide on any rights he may have in the premises.

It is, therefore, ordered, that the judgment of the District Court be reversed, so far as the rights of the opponent Meyer are concerned; and it is ordered and decreed, that the sale made by the sheriff of the parish of St. Landry, of the land described in his return, and in the petition for a monition, be annulled and set aside, so far as the rights of the opponent Charles Meyer are concerned; the plaintiff paying the costs in both courts.

 LOUIS THEODORE MOREAU v. EDOUARD CHAUVIN and another.

Where a vendor fails to comply with a stipulation made by him to cause a general mortgage existing on the property sold to be erased, the purchaser may require the rescision of the sale. C. C. 1920, 2041. To determine whether a failure of a party to execute an engagement will authorize the rescision of the contract, it is only necessary to consider whether the stipulation be such that the contract would not have been entered into without it.

Plaintiff purchased a slave from defendants, who stipulated in the act of sale to erase, within a certain time, a general mortgage existing on the property in favor of the minor children of their vendor, which the latter had bound herself to cancel. The mortgage not having been erased, plaintiff sued to rescind the sale. On a plea by defendants that they had not been put *in mora*, in the manner prescribed by arts. 1905, 1906, 1907 of the Civil Code, it was shown that they had been repeatedly requested to comply with their contract, and that, eighteen months after the period at which the mortgage was to have been erased, their vendor, though often requested to do so, had not instituted any proceeding for the purpose of giving a special mortgage, in place of the general one she had agreed to erase. *Held*, that in such a case it was unnecessary to put the defendants in default in the manner required by arts. 1905, *et seq.*, of the Civil Code; and that, the thing to be performed depending on the will of another, over whom they have no control, the contract is dissolved of right, in consequence of their inability to comply with it. C. C. 2041, 2042.

On the rescision of the sale of a slave for defects in the title, interest on the price cannot be allowed from judicial demand, where the slave remained in the possession of the purchaser. His services must be regarded as equivalent to the interest of the purchase money. Interest should be allowed only from the date of the return, or tender, of the slave to the vendors, in pursuance of the judgment rescinding the sale.

APPEAL from the District Court of the First District, Buchanan, J.

Josephs, for the plaintiff. The defendants bound themselves absolutely to cause the mortgage existing on the slave sold to plaintiff, to be erased by a certain period. This stipulation was the law of the parties. "*Si la volonté des contractans est manifestée expressément et sans équivoque,*" says Toullier, "*on doit s'y soumettre avec une obéissance aveugle, sans qu'il soit permis d'examiner si l'exécution de la condition peut être utile, s'il ne s'agirait pas plus avantageux de l'exécuter d'une autre manière.*" Vol. 6, Des Contrats, No. 606.

Art. 2033 of the Civil Code declares that, "when an obligation has been contracted on condition that an event shall happen within a limited time, the condition is considered as broken, when the time has expired without the event having taken place," &c. In cases like the present, the institution of suit is a sufficient putting in mora. Art. 1907 of the Civil Code describes the class of cases in which a previous demand is required to be made. The case of *Erwin v. Fenwick*, 6 Mart. N. S. 233, relates to such cases.

Again: If A enters into an obligation that C shall perform a certain act within a given delay,—who is B to put in default admitting the necessity of such a course? As the performance of the obligation depends on the will of a third person, C, it would be absurd to demand it from A; and as there exists no privity of contract between B and C, the former has no right to call upon the latter. Fortunately for the plaintiff this has not been left as a vexed question. The Civil Code, art. 2041, provides that, "a resolutive condition is implied in all cumulative contracts, to take effect in case either of the parties do not comply with his engagement. In this case, the contract is not dissolved of right; the party complaining of a breach of the contract may either sue for its dissolution, with damages, or, if the circumstances of the case permit, demand a specific performance." So much where the obligations depend solely upon the will of the parties contracting. But art. 2042 provides that, "in all cases the dissolution of a contract may be demanded by suit, or by exception; and when the resolutive condition is an event not depending on the will of either party, the contract is dissolved of right," &c. In this case the condition was an event depending upon the will of Mad. Xavier; and it was not in the power of the defendants to control the exercise of that will. She has not seen fit, although three years have elapsed, to exercise her will; and the defendants, upon the rescision of the sale, will have a

direct action against her for all damages which they may sustain by the non-execution of her original obligation.

Art. 1905 of the Code provides three modes by which a party may, by his own act, demand that a *contract be carried into effect*. 7 La. 193. But the plaintiff does not demand that any contract should be carried into effect. The contract is null by its terms, as well as by operation of law.

No tender of the slave was necessary. The return of the slave will be the consequence of the rescision of the sale, from which time the plaintiff will become the debtor of defendant for the slave, as the latter will become his debtor for the price. Code of Pract. arts. 404 to 418. Interest was properly allowed from judicial demand. The price was due to plaintiff at that time. Its payment was delayed by the fault of the defendants; and interest is the damages for such delay. Civil Code, art. 1929.

Castera, for the appellants. The obligation of the defendants was to do a certain thing. Such an obligation may be violated actively or passively. Civil Code, art. 1925. The violation complained of—the failure to cause a mortgage to be erased—was passive. In such a case damages are only due after the debtor has been put in default. Civil Code, art. 1927. See *Erwin v. Fenwick*, 6 Mart. N. S. 239. *Llorente v. Gaitrie*, lb. 623. *Rowe v. Hall*, 1 La. 97. *Reynolds v. Yarborough*, 7 La. 193. *Lobdell v. Parker*, 3 La. 331. The defendants not having been in default by the terms of the contract, nor by the effect of the law, could only have been put in *mora* by the act of the party, which has not been done.

Interest was incorrectly allowed by the lower court. Plaintiff having retained the slave, had the benefit of his services.

MORPHY, J. The plaintiff seeks to rescind the sale of a slave made to him by the defendants on the 5th of May, 1841, on the ground that they had failed to comply with the conditions and obligations of their contract. He alleges, that at the time of the sale there existed on the slave sold to him a mortgage, which the defendants bound themselves to raise and cancel, within forty days from the 8th of April, 1841; that his mortgage was a general one, existing against their vendor, the widow François Xavier, as tutrix of her minor children, which she in her sale to them had obligated herself to convert into a special mortgage, so as to release the slave from that incumbrance, within the above mentioned delay; that this obligation of hers was assumed by the defendants; and that although the forty days have long since expired, and the price of the sale has been paid, this general

mortgage yet continues to exist, and prevents him, the plaintiff, from disposing of the slave, whom he is desirous of selling, &c. The defendants pleaded the general issue, and the want of amicable demand. There was a judgment below rescinding the sale, and decreeing the return of the purchase money, with legal interest from judicial demand, on the plaintiff's restoring or tendering the slave to the defendants. The latter have appealed.

The petitioner's right to obtain the rescision of the sale cannot be questioned. The contract is a synallagmatic one, in which the resolutory condition is always implied, in case either of the parties fails to comply with his engagement. The party in regard to whom the contract has not been executed, has the choice either to compel the other to the execution of the agreement, if it be possible, or to demand its dissolution, with damages. Civil Code, arts. 1920, 2041. To determine whether the failure to execute an engagement authorizes a suit for the dissolution of the contract, it is only necessary to consider whether the engagement is such that the contract would not have been entered into without it. In the present case, it is not to be presumed that the plaintiff would have bought this slave, had the vendor not undertaken to have the general mortgage existing upon the slave removed. Pothier, *Traité de la Vente*, No. 475. But the counsel for the appellants urges, that the plaintiff cannot maintain this action, because he has not put the defendants *in mora*, pursuant to the several provisions of the Civil Code, which require this formality as a pre-requisite to the recovery of damages, or the rescision of a contract. Arts. 1905, 1906, 1907. There has not been, on the part of the plaintiff, a strict compliance with these articles, in the manner in which the defendants have been called upon to execute their contract; but the evidence shows, that they were several times requested to have the mortgage raised; that the plaintiff was prevented from selling the slave, by reason of this incumbrance; and that more than eighteen months after the expiration of the time within which it was to have been removed, the widow Xavier, although often solicited by the defendants to comply with her engagements to them, had instituted no proceedings whatever to give a special mortgage, in lieu of the general one she had agreed to raise. It appears to us

that, in a case like the present, it was not necessary to put the defendants in default in the manner pointed out by the articles of the Code relied on by the counsel. The object of the putting in default is, to secure to the creditor his right to demand damages, or a dissolution of the contract, so that the debtor can no longer defeat this right, by executing or offering to execute the agreement. After the debtor has been put *in mora*, his offer to execute his engagement comes too late, and cannot be listened to. 6 Toullier, No. 255. But where the party is unable to comply with his obligation, when the thing to be performed depends on the will of another person, over whom he can exercise no control, the contract is dissolved of right, and the formality of putting him in default would be a vain and useless ceremony. *Lex neminem cogit ad vana*. Civil Code, arts. 2041, 2042. *Garcia et al. v. Champomier et al.* 8 La. 522.

There is error, however, we think, in that part of the judgment which allows the plaintiff legal interest on the purchase money, from the day of judicial demand until paid. It is shown that the slave is yet in his possession. His services may be regarded as a full equivalent for the use of the money which the defendants have had. As long as she is not restored or tendered to them, they are not liable for any interest on the price they have received.

It is, therefore, ordered, that the judgment of the District Court be affirmed, so far as it annuls the sale of the slave Mary, and condemns the defendants to reimburse to the plaintiff the sum of seven hundred and fifty dollars, on the plaintiff's restoring or tendering to them the said slave; and that it be reversed so far as it allows legal interest on that sum from the day of judicial demand. And it is further ordered, that the defendants do pay legal interest upon the said sum of \$750, from such time as may be fixed by the judge below, upon satisfactory proof being made before him that the slave Mary has been restored or tendered to them by the plaintiff; and that, for this purpose, the case be remanded for further proceedings. The costs of this appeal to be borne by the appellee.

JOHN DONALDSON v. JOHN COWEY.

APPEAL from the Parish Court of New Orleans. *Maurian, J. Collens*, for the plaintiff.
Bartlette, for the appellant.

GARLAND, J. This suit is brought to recover \$500 damages, which the plaintiff alleges he has sustained in consequence of the unfaithfulness and want of skill of the defendant, in plastering several houses in this city on Villeré street. A person named Daley was made a garnishee, who confessed that he had some assets of the defendant's in his hands. The answer contains an exception, that all the matters in controversy have been adjudicated, in a suit between Daley and the plaintiff, in the City Court of New Orleans, a general denial, and a plea of prescription. There was a judgment in favor of the plaintiff, and the defendant has appealed.

It appears from the mass of testimony in the record, which is contradictory in many respects, that the plaintiff, in the month of January, 1838, employed the defendant to plaster a block of buildings, one hundred and fifty-six feet long by thirty-eight feet in depth, for which the former was to pay the latter at the rate of forty cents per yard. The quality of the materials to be used, is not proved. The buildings are framed of wood, and lathed and plastered inside and outside. The work was executed in the months of January and February, in the year, 1838, and the whole value of it was between eleven and twelve hundred dollars. The plaintiff was himself the builder of the houses, and was daily about them while the defendant was at work, and saw what he was doing. No complaint was made then, as to the quality of the materials used, or the unfaithfulness of the work. When it was completed, the parties had a settlement, the work was received, a sum of money was paid to the defendant, and two notes given for the balance owing, one of which was paid by a person named Walker, to whom the houses belonged, or who had an interest in them. (For the particulars in relation to that interest, see the case of *Donaldson v. Walker*, 7 Rob. 329.) Walker, in his testimony;

says, that he was the owner of the buildings on which the work was done; that Donaldson was the builder for him; and that in settling with him, (Donaldson,) nothing has ever been deducted or claimed for bad workmanship in the plastering. A number of witnesses swear, that the work was not well done, and that bad materials were used; as many say directly the reverse. The ground of complaint is, that river sand was used in place of sharp sand, and that not enough hair was put into the mortar. The witnesses for the defendant say that, as it does not appear what kind of sand was to be used, they can only judge what materials were to be used from the price given for the work, and that it was so small, that it could not be expected that the best materials were to be used. All the witnesses state, that some of the plastering peeled off the outside of the buildings; and Walker states that, up to the time of giving his testimony, it had cost about \$80 to replace it. This was about three years after it was finished. The witnesses for the plaintiff state, that the plastering on the body of the houses in the rear is loose, and that to take it off and replace it anew, would be worth from three to five hundred dollars; some few say more. The witnesses for the defendant say, that as the plastering was put on in the winter season, it would peel off on the outside, and no workman would warrant its standing, unless he was paid a sufficient price to induce him to use the best materials, and to do the work in an extra manner. The defendant soon after he completed the work, left the country, and returned to Ireland. He left the note of the plaintiff with Daley, the garnishee, to collect it, as agent, and for that purpose endorsed it. The note was protested at maturity; and, in May, 1840, more than two years after it was given, a suit was commenced on it in the City Court by Daley. To this demand Donaldson answered, that the note was not Daley's, but was in fact the property of the present defendant, and that it had been transferred, to prevent him, Donaldson, from making a good and equitable defence which he had. He then averred that, the consideration had failed, as it was given for plastering; that the work turned out badly, and was unfaithfully executed; and that he was not bound to pay for it. Upon the trial of this cause, there was a judgment against Donaldson; but the portions of the record now

before us, do not enable us to say precisely on what grounds, although the judge in his judgment says, "that Donaldson has failed to prove the want of consideration," wherefore he gives judgment against him. It was after this, that the present suit was commenced.

The exception of *res judicata* does not appear to have been decided on by the judge below ; and, as the evidence before us in relation to it is vague and doubtful, we shall pass it over, as we are satisfied, upon the merits, that the plaintiff ought not to recover, and that this demand is an afterthought, got up for the purpose of defence, when the holder of the note given to the defendant was pressing for its payment. The plaintiff does not allege that the houses on which the plastering was done, belong to him, nor is it proved. On the contrary, Walker swears they were his, and that the plaintiff was the builder, and that he has never claimed any thing as a deduction for the bad work. The work was executed under the eyes of the plaintiff ; he is a workman himself, and was then engaged in putting up the houses in question. The work was received, a settlement made, and no complaint for more than two years, until the workman had left the country, and his agent was pressing for payment of the note. The judge of the Parish Court expresses some doubts as to the measure of damages, as the statements of the witnesses are widely different ; and he therefore says, that he will allow only half of what is asked. The case was not tried by a jury. From the record it is fair to presume, that the statements of a number of the witnesses were not made in the presence of the judge, but were taken down out of his presence. Upon a full review of all the evidence, we think the law and equity of the case are with the defendant.

The judgment of the Parish Court is therefore reversed, and ours is for the defendant, with costs in both courts.

GUSTAVE DUCROS v. AUGUSTIN CHARLES FORTIN.

The District Court of the United States, sitting in bankruptcy under the act of Congress of 19 August, 1841, was authorized to cite persons holding mortgages, under the State laws on property surrendered by a bankrupt, and to order the erasure of their mortgages, when necessary for the settlement of the bankrupt estate.

The clause, *de non alienando*, in a sale in which the vendor reserves a mortgage, does not prevent a sale of the property by the mortgagor. The latter may transfer the property, subject to the right which that clause gives the mortgagee of proceeding summarily against it, as if still belonging to the mortgagor.

Where one holding a mortgage on property surrendered by a bankrupt under the act of 19 August, 1841, though cited before the District Court of the United States in which the proceedings in bankruptcy were pending, to show cause why the property mortgaged should not be sold free of encumbrance, reserving his rights upon the proceeds, suffers the rule taken on him to be made absolute without opposition, he must be considered as having waived any right he may have had to oppose it, and he will be bound thereby. He cannot afterwards be permitted to set up his mortgage against a *bona fide* purchaser, who has bought on the faith of his apparent acquiescence.

APPEAL from the District Court of the First District, *Buchanan, J.*

Eyma and Marsoudet, for the plaintiff.

Latour and Roselius, for the appellant.

MORPHY, J. Augustin Charles Fortin, having sued out an order of seizure and sale against P. H. Colsson, to obtain the payment of a note of \$1250, due to him as vendor of a tract of land situated on the Gentilly road, the proceedings were enjoined by G. Ducros, on the ground that the property seized was no longer subject to Fortin's mortgage; that it had been sold by Colsson to Clement Ramos, who has been since declared a bankrupt by a decree of the United States District Court for the Eastern District of Louisiana, sitting in bankruptcy; that the property in question was surrendered by Ramos to his creditors, and sold under a decree of that court, on the 8th of August, 1842, at which sale, he, the said Ducros, purchased it free from all mortgages and encumbrances, they having been erased and cancelled under the authority of the said court, after due notice to Fortin and all the other mortgagees; that the said Fortin, who was a party to these proceedings, and made no objection to the cancelling of his mortgage, is bound by them; that he cannot claim under a mort-

gage which no longer exists ; and can only exercise his rights on the proceeds of the property in the bankrupt court, according to its rules and regulations. The injunction was made perpetual, and the seizing creditor has appealed.

The record shows, that on the 29th January, 1840, Fortin sold to Colsson, a tract of land on the Gentilly road, for four thousand dollars, in payment of which he received three notes to the order of, and endorsed by, P. H. Kernion, one for \$1500 at sixty days, and two others for \$1250 each, payable at one and two years from the date of the sale. These notes were secured by mortgage, with a stipulation on the part of the purchaser, that the property should not be alienated to the prejudice of the mortgage. On the 3d of March, 1841, Colsson sold the property to Clement Ramos, who, in part payment of the stipulated price, assumed to pay to Fortin the last of the two notes of \$1250 each, yet due to him. Fortin did not make himself a party to this sale by signing it ; but it is shown, that he was present at the office of the notary when it was passed, and agreed to take, in lieu of the other note of \$1250 due to him by Colsson, a note of J. D. Pigneguy for an equal amount, which is mentioned in the act of sale, as a part of the consideration paid by Ramos. In June, 1842, Ramos was declared a bankrupt, having surrendered the property in question, and placed Fortin on his schedule as a mortgage creditor for the note of Colsson, which he had assumed. It further appears, that on the 22d of October, 1842, Fortin was personally served with notice of a rule to show cause why his mortgage on the Gentilly road plantation should not be raised and cancelled, in order to give an unencumbered title to the purchaser thereof, reserving all his rights on the proceeds of the sale. No objection having been made by Fortin, a decree was rendered ordering the mortgage to be cancelled. This was done, and the property was sold to Gustave Ducros, free of all incumbrance.

In the case of Conrad, assignee of the estate of Thomas Banks, praying for a *mandamus*, (5 Robinson, 49,) this court held, after much deliberation, that the United States District Court, sitting in bankruptcy, was competent to cite the mortgage creditors, and to make an order for the erasure of their mortgages, as a necessary step to the settlement and liquidation of the bankrupt's

Ducros v. Fortin.

estate. It is useless to repeat the reasoning by which we arrived at that conclusion, as no new arguments have been offered in opposition to it, and our views on the subject remain unchanged. Holding, then, as we do, that the District Court, sitting in bankruptcy, had jurisdiction to order the erasure of Fortin's mortgage, we cannot consider it as being yet in force on the property in the hands of the purchaser at the marshal's sale. But it is said, that Fortin was a creditor, not of the bankrupt, but of Colsson, who had granted this mortgage with the clause, *de non alienando*, and that the effect of this clause is such that, without Fortin's consent, no valid sale could be made by Colsson; that Ramos never acquired any right to the property; and that, therefore, his assignee could transfer none to the appellee, G. Ducros. The bankrupt having assumed to pay a note held by Fortin, could not but consider him as his creditor, and place him, as such, on his schedule, pursuant to the bankrupt law. This assumption was made with the full knowledge of Fortin, who, by receiving in payment one of the notes given by Ramos to Colsson, reduced the debt of the latter to him to the \$1250, which was assumed. We do not consider the clause, *de non alienando*, as producing the effects supposed by the counsel. It does not absolutely prevent a sale of the property by the mortgagor. The latter may transfer the property, subject to the right which such a clause gives to the mortgagee of proceeding summarily against it, as if still belonging to the mortgagor. The purchaser acquires a valid title, which he can, in like manner, transfer to others. The title, then, to this property, which was in Ramos, became under the bankrupt law, vested in the assignee. When the latter, acting under the authority of a court, which, it must be admitted, was not without jurisdiction, at least, *ratione materiae*, called upon Fortin and the other creditors to show cause why the property should not be sold free of their mortgages, the appellant should have opposed the sale, if he had any objection to urge, either because he conceived that he was not a creditor of the bankrupt, or by reason of any right he supposed himself possessed of under the clause, *de non alienando*. Having made no opposition, and suffered the rule to be made absolute, he must be considered as having waived his rights, if any he had, and is bound by the decree. After receiving full

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warning that the property was about to be sold, free of his mortgage, to settle the estate of the bankrupt, and that he would have to look to the proceeds of the sale, after having stood by and seen the property thus sold; and after a *bona fide* purchaser had paid his money on the faith of his apparent acquiescence and consent, the appellant cannot surely be permitted to set up his claim or mortgage, in opposition to such a purchaser. 3 Robinson, 333. 1 Story's Equity, § 384.

Judgment affirmed.

PATSEY SHALL v. THOMAS BANKS.

Motions to dismiss appeals must be filed in writing before joinder in error or answer to the merits, or such preliminary objections will be considered as waived.

To enable a lessee to recover from the lessor the cost of repairs to the premises leased made by the former, he must show that the latter refused or neglected to make them, though requested to do so; that they were indispensable, and such as the lessor was bound to make; and that the price paid for them was reasonable. C. C. 2663, 2664.

APPEAL from the District Court of the First District, *Buchanan, J.*

Claiborne, for the plaintiff.

C. M. Jones, for the appellant.

GARLAND, J. The petitioner alleges, that she leased of the defendant a hotel in the city of New Orleans for the term of four years, at the rent of \$12,500 per annum, payable quarterly, to secure which sum she gave sixteen notes, four of which were delivered to the defendant on the 1st of November, 1838, when the lease commenced, and the others were deposited in the bank to be delivered annually. She also avers, that said hotel was to be delivered on the day mentioned, in good order and condition, with all the necessary appurtenances, so that she could open it for the reception of company immediately, and proceed with her business. The petition then proceeds to allege, that the hotel was not so delivered; and further, that many fixtures, indispensably necessary to an establishment of the kind, which were in it when the contract was made and represented by the defendant

as forming a part of it, were removed or destroyed, previous to the day of delivery ; in consequence of which, as the petitioner alleges, she could not open the hotel for about fourteen days, whereby she lost or sustained damage to the amount of \$1168, 26 ; and was furthermore obliged to expend the sum of \$1169, 63, in having the necessary repairs and fixtures made, a detailed account of which is filed. For the two sums aforesaid, a judgment is asked, and an injunction was issued to restrain the defendant from withdrawing from the bank one of the notes amounting to \$3125, which was discharged on his giving bond and security. The answer to this demand is a denial of any indebtedness or responsibility whatever.

The lease annexed to the petition does not state what the condition of the building and fixtures were at the time of the contract, but contains a promise, on the part of the lessee, to restore everything in the same order as she received it, the ordinary wear and tear excepted ; and the lessor "promises and binds himself to have the roof of said premises kept tight and in good order, during the continuance of the lease, and nothing farther." The other clauses it is not necessary to state.

The parol testimony shows that, before the plaintiff took possession of the premises, a tenant who had occupied them for some years previously, took down and carried away, or sold to the plaintiff, various fixtures in the kitchen, bar-room, and other places about the house. The plaintiff sent one or more messages to the defendant, informing him what was being done, and he replied that he would stop it or prevent it. On the 1st of November, 1838, the day mentioned in the lease, the plaintiff took possession of the premises, but did not, so far as the record informs us, call on the defendant to make any repairs, or replace any of the fixtures, furniture or cooking utensils, destroyed or taken away by Waterman, the former tenant ; but she at once proceeded to have such repairs and fixtures made, without authority, and it is proved, expended about \$1168 26 in that way, which constitutes the first part of her demand. It further appears, that the plaintiff had engaged three bar-keepers at annual or monthly wages, and also two porters, whose time commenced on the 1st of November, 1838, and that, in consequence of car-

rying on the aforesaid repairs and work, neither the hotel could be opened for the reception of boarders and company, nor the bar room for the patrons of such an establishment, until the 14th of the month. One of the bar keepers swears, that the average receipts at the counter would have been \$175 per day ; but what could have been made in the hotel is not shown ; nor is it shown what part of the \$175 per day was profits.

During the pendency of the suit, on motion of the counsel for the plaintiff, it was "ordered, that F. B. Conrad, Esq., assignee of the defendant, be made a party to this suit." No notice of this motion and order was ever served on any one, nor is there any plea or evidence in the record, of the defendant ever having become a bankrupt, or in what manner Mr. Conrad became his assignee. No certificate of discharge as a bankrupt is set up as a bar to the action, or offered in evidence.

The judge below, being of opinion that the plaintiff had made out her demand, gave her a judgment "against the defendant, represented by his assignee in bankruptcy" for \$2066, with legal interest until paid ; from which judgment the defendant has appealed.

During the month of May last, the counsel "agreed that this cause should be submitted to the court by argument in writing." At the time of this agreement no motion had been filed to dismiss the appeal, but the counsel for the appellee, in his written argument, presented some days after the submission of the case, insists upon its dismissal, because, as he avers, the defendant, Banks, is a certificated bankrupt and cannot stand in judgment, and his assignee has not appealed.

It is the settled practice of this court, that motions to dismiss appeals must be in writing before there is a joinder in error, or answer to the merits, otherwise the preliminary objections are considered as waived. But if this were not the well established practice of the court, the appellee in the case could not succeed in her object, as there is not the slightest evidence before us that Banks is a bankrupt, and he does not seek to discharge himself by any such plea.

Upon the merits of this case, we are of opinion the court below erred, in giving a judgment for the plaintiff. Article 2663

of the Civil Code tells us that, the lessor is bound to deliver the thing in good condition, and during the continuance of the lease, to make all the repairs necessary, except those the tenant is bound to make. Article 2664 further declares that, if the lessor do not make the necessary repairs in the manner required, the lessee may call on him to do it; that, if he refuse or neglect to make them, the lessee may then cause them to be made and deduct the price from the rent due, on proving that the repairs were indispensable, and that the price which he has paid is reasonable. In this case, there is no proof that the plaintiff ever called on the defendant to make the repairs, the price of which is now claimed. It is not shown that they were indispensable, nor is the price paid, proved to be just and reasonable. The book-keeper of the plaintiff swears, that the bills were paid, but he knows nothing further about them. He was not in the employment of the plaintiff, until all the alleged repairs were completed. None of the workmen engaged in making them were examined, to show the necessity or utility of what was done. The owners of houses would soon be ruined, if it were permitted to every tenant to make such repairs as his fancy or caprice might dictate, without notifying the owner of the property of the intention.

As to the damages, only one witness testifies in relation to them, and he fixes no sum at all; yet they have been allowed at the rate of about one hundred dollars per day. We should require very conclusive proofs, that the plaintiff could have made that much, clear of all expenses, in the first two weeks after opening a new establishment of the kind she kept.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that there be judgment against the plaintiff, as in case of nonsuit; she paying the costs in both courts.

Keyes and another v. Shannon and another.

JOSEPH M. KEYES and another v. PIERCE SHANNON and another.

Where property attached is released on the execution of bond with surety, and the debtor makes a surrender of his property before judgment, after which the action is cumulated with the insolvent proceedings, and a judgment for the claim is entered up with the consent of the syndic, the surety will be discharged. *Per Curiam* : Had no bond been given, the property attached would not have been subject to satisfy the judgment rendered against the syndic, but would have formed a part of the general fund from which all creditors were to be paid. The bond represents the property attached, so far as the attaching creditor is concerned. If, under the judgment against the syndic, the attaching creditor could have had no privilege on the property seized, he can have no right upon the bond, as the property represented by it has gone to the benefit of the mass of the creditors.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Elmore and W. W. King*, for the plaintiffs.

Benjamin, for the appellant. The court below erred. The appellant bound himself to *satisfy such judgment as plaintiff might obtain against P. Shannon & Brother*. He so bound himself, because defendants had assured him that no judgment could possibly be obtained against them, inasmuch as they intended surrendering their property for the common benefit of their creditors, which they accordingly did. As the event on which the surety was bound to pay has never happened, he cannot be held responsible.

But the court below has decided, that a judgment against defendants' syndics, is the same thing as a judgment against defendants in person. This position will not bear an instant's examination. On the face of the judgment against the syndic, it is a mere liquidation of the debt. It was rendered on the confession of the syndic's attorney, expressly on the ground of its being considered merely as a liquidation of the debt. This judgment against the syndic was idle and useless. *Ex nihilo nihil fit*. It can create no rights against the appellant. The law requires or permits parties to sue, or to continue suits, against syndics, administrators, curators, &c., for the purpose of liquidating claims that are disputed. But if such syndics, curators, &c., do not contest the claim, there is neither sense nor reason in having judgments entered in court; because the syndics or curators are by such judgments merely bound to place the claims on their tableaux of distribution when filed, and for obtaining this result, the judgment is idle and useless, if the debt is uncontested.

The bond of the defendants represents the property, so far as the attaching creditor is concerned. If the property had remained subject to the attachment, plaintiffs would have obtained no privilege on it, inasmuch as they failed before the plaintiffs obtained judgment. The jurisprudence on the subject is settled by repeated decisions of this court. The cession of property by defendants, dissolved the attachment of the plaintiffs, and reduced them to the level of ordinary creditors; and they cannot now have any rights on the bond, as the property attached, and which was represented by the bond, has gone to the benefit of the mass of the creditors. *Marr v. Lartigue*, 2 Mart. 89. *Hanna v. His Creditors*, 12 Mart. 65. *Fisher v. Vose*, 3 Rob. 461.

MORPHY, J. A. McKeever is appellant from a judgment rendered against him, as surety of the defendants, on a bond signed by the latter to obtain the release of certain goods attached by the plaintiffs. This suit was begun by attachment in the Commercial Court of New Orleans, on the 16th of March, 1840. Some property was attached, which was released on the defendants' giving bond, with A. McKeever as their surety, on the 20th of March, 1840. The condition of the bond was, that "if the defendants, Pierce Shannon and brother, should satisfy such judgment as might be rendered against them, the obligations should be void, or else should remain in full force." On the following day, on the 21st of March, 1840, the defendants filed their schedule in the Probate Court, and made a cession of their property, whereupon the judge made the usual order, directing a meeting of their creditors to be held, and all proceedings against the persons and property of the insolvents to be stayed. On the schedule, the debt sued for by the plaintiffs was admitted to be due. The suit of Keyes & Roberts was transferred from the Commercial Court to the Parish Court, and cumulated with the proceedings in insolvency. On the 15th of November, 1841, the syndic's attorney filed a written consent, upon which judgment was entered up against the syndic, on the same day, for \$166 38, with legal interest from the day of judicial demand.

Under these facts, it appears to us, that the court below erred in giving judgment against the surety on the bond. McKeever bound himself to satisfy such judgment as the plaintiffs might obtain against the defendants in the suit against Pierce Shannon & Brother. No such judgment was ever rendered against them, as

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they failed the very next day, and all proceedings against their persons and property were stayed. The event on which the surety undertook and bound himself to pay, has never happened. The judge below was of opinion, that the judgment against the syndic was the same thing as the judgment against the defendants in person. We cannot so consider it. The debt for which suit had been brought by Keyes & Roberts being admitted, the judgment entered up by consent against the syndic, was an idle and useless proceeding. It only bound the syndic to place the claim on his tableau of distribution, when he should file one. This he could and would have done without this judgment, as the debt was undisputed. The 35th section of the act of 1817, which provides for the continuance of suits against the syndic, applies to claims which are contested, and which it is necessary to liquidate. The judgment rendered by consent against the syndic, after the defendants had failed, is not such a judgment as was contemplated by the parties to the bond. They had in view a personal judgment against the defendants in the suit; one that could have been satisfied out of the property attached, which the bond was intended to represent. Had the attachment not been dissolved, it is clear, that the property attached would not have been subject to satisfy this judgment rendered against the syndic, as the representative of the creditors of the insolvents. The property attached must have been considered as part of the general fund, from which all the creditors were to be paid. The plaintiffs had obtained no privilege on it, inasmuch as the defendants failed before any judgment was obtained. 2 Mart. 98. 12 Mart. 32. 3 Rob. 461.

The bond of the defendants represents the property so far as the attaching creditors are concerned. If, under the judgment rendered against the syndic, they would have had no privilege on the property seized under their attachment, they cannot have any right on the bond, inasmuch as the property attached, and which was represented by the bond, has gone to the benefit of the mass of the creditors. They stand in the same situation as if the property had remained subject to their attachment. In the case of *Marr v. Lartigue*, (2 Mart. 89,) wherein it was for the first time decided, that an attachment gives no lien in case of the

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defendant's failure, the Superior Court of the territory said : " Had the defendant relieved himself from the seizure, he would have given security to defend the suit and abide the judgment of the court. Could the penalty of the bond have been recovered, when afterwards, and before judgment, the proceedings were stayed, so that no judgment could be obtained, and the debt became by law, or the consent of the majority of the creditors, reduced in its amount, and payable out of a certain fund only ?" The case then supposed by the court, is the very one now under consideration, and we concur in the opinion, that no recovery can be had, as no judgment was ever rendered against the defendants within the sense and meaning of the bond, and the contemplation of the parties to it.

It is, therefore, ordered, that the judgment of the Parish Court be reversed, and that ours be in favor of A. McKeever, the defendant in the rule, with costs in both courts.

MATHILDE LA GOURGUE v. PATRICK SUMMERS.

Where the proceeds of property sold under a special mortgage are more than enough to satisfy the mortgage under which the sale was made, and there are subsequent general mortgages existing against it, the surplus of the price should be applied by the sheriff to the satisfaction, *pro tanto*, of the subsequent general mortgages according to their dates, unless ascertained to have been previously satisfied, before giving the release which the purchaser has a right to demand. In such a case, the sheriff has a right to require the payment of the whole price ; nor would the levying of an execution upon such surplus by any other creditor of the mortgagor, secure any privilege to the seizing creditor.

The receipt of a twelve-months' bond by a seizing creditor does not operate a satisfaction of the judgment. If the bond be unpaid, the creditor has his recourse against the debtor.

A judicial mortgagee, in whose favor a twelve-months' bond has been taken for the price of property sold under an execution against his debtor, must show, that the bond or property seized proved insufficient to satisfy his claim, to entitle himself to a preference over subsequent judicial mortgagees, in the distribution of the proceeds of other property subject to the general mortgages existing against the debtor. C. P. 715.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

Bartlette, for the appellant.

Denis, contra.

SIMON, J. The plaintiff is appellant from a judgment discharging a rule which he had obtained on the sheriff of the parish of Orleans, to show cause why he should not pay over to him the money in his hands, seized under the writ of *feri facias* issued in this cause, as appears by his return thereon; and further praying that Dawson & Co., and G. T. Laguerenne, two of the defendant's judgment creditors, might be notified of the rule.

The plaintiff obtained judgment against the defendant Summers, on the 17th November, 1840, for the sum of \$525, with interest and costs, which judgment appears to have been duly recorded in the office of the recorder of mortgages; and an execution having been issued thereon, the same was levied on the 21st of October, 1843, by the sheriff of the parish of Orleans, on *the surplus in his own hands of the proceeds of the sale of the property seized and sold at the suit of Lucien Soulié v. Patrick Summers, after satisfying the judgment of the seizing creditor*, said surplus amounting to \$304, which the sheriff keeps subject to the order of the Parish Court.

It further appears, that the property, the surplus of the proceeds of the sale of which was seized as above stated, was seized and sold by the said sheriff, to satisfy a debt secured by special mortgage granted on the same by Summers in favor of Lucien Soulié, long previous to the recording of the plaintiff's judgment; and that the property mortgaged was sold for \$2725, of which, after satisfying the claim of the seizing creditor, there remained a balance in the sheriff's hands, amounting to the sum of \$304.

The record shows, that Dawson & Co., the recording of whose judgment is anterior to plaintiff's, having issued execution thereon, in January, 1841, caused it to be levied on a piece of real property belonging to the debtor, which was shortly afterwards sold by the sheriff at twelve months credit, for a sum much larger than necessary to satisfy the execution. A bond was furnished in their favor by the purchaser for the amount of the debt, interest and costs, with good and sufficient surety, and special

mortgage reserved on the property sold, which bond fell due on the 6th of April, 1842.

The record shows also, that Laguerenne, whose judgment was recorded previous to the plaintiff's, issued an execution thereon, in December, 1840, which was returned by the sheriff in March following, in these words: "Costs satisfied, and judgment settled between the parties."

It further appears by a certificate of mortgage produced on the trial, and dated the 17th of October, 1843, that the property seized and sold in the suit of *Soulié v. Summers*, was, at the date thereof, subject to several mortgages, to wit: 1st. To the special mortgage of Soulié. 2d. To the judicial mortgage of Dawson & Co. 3d. To the judicial mortgage of Laguerenne; and 4th, to that of the plaintiff; and also to four other posterior judicial mortgages. But by another certificate of mortgage, also produced on the trial of this cause, and dated the 10th of April, 1844, it is declared by the recorder of mortgages, that "*there is no mortgage standing in the name of Patrick Summers, and recorded against a certain lot of ground, &c.*," the description of which is exactly the same as that of the property sold at the suit of Soulié, and the balance of the proceeds of the sale of which is now in controversy.

With these facts before us, it is contended by the appellees, that the funds in the hands of the sheriff ought to be applied to the satisfaction, *pro tanto*, of their judgments, the recording of which is anterior to that of the plaintiff's; that the funds represent Summers's property, on which their mortgage stood; and must be distributed according to law, and not be paid over to the fourth mortgagee, whilst the second and third are not satisfied..

On the other hand, the appellant insists, that he is entitled to the benefit of his seizure, and that the sheriff is bound to pay over to him the amount upon which his execution was levied.

By art. 707 of the Code of Practice, if the seizing creditor has a special mortgage on the property seized, which is preferable or anterior to other mortgages existing on the property, the sheriff can only require the purchaser to pay the price, to the amount of the seizing creditor's mortgage, and the purchaser *keeps the surplus*

of said price, to be by him applied to paying the inferior or subsequent special mortgages existing on the property. This article only applies to special mortgages, the owners of which can subsequently call upon the purchaser for the payment of the balance, or surplus remaining in his hands, according to their rank.

Art. 710, of the same Code, provides for the cases in which there exists a general mortgage on the property sold, resulting either from a legal or *judicial mortgage*, and says, that the purchaser *cannot retain any part of the price* for the purpose of paying it, or refuse paying the same, unless he is in danger, by a suit already commenced against him, of being evicted, or unless he has just reason to fear that a suit will be instituted; in which case he may retain the price, unless the suing creditor shall relieve him from the disturbance, or give him proper security against it. From the words of this article, it is obvious, that its provisions apply more particularly to judicial mortgages anterior in date to that of the suing creditor; for, as to those posterior in date, there would be no need of providing against any danger of eviction or disturbance from their existence, as they could never be an impediment to the suing creditor's applying the proceeds of the sale of the property, first to the satisfaction of his mortgage claim; and the subsequent mortgagees could never complain of the sale, or disturb the purchaser. Be this as it may, it is clear from this article, that the purchaser cannot retain any part of the price except in certain cases when the property sold is subject to special mortgages, other than the seizing creditor's; and that the amount of the price must be paid to the sheriff, without any regard to the general mortgages. Thus, the sheriff has a right to require payment of the whole price, unless there be special mortgages; and the question presents itself, what must he do with the balance, after satisfaction of the debt due to the seizing creditor? This question was answered by us in the case of *Powell v. Kellar*, (5 Robinson, 272,) in which, under what we considered to be a correct application of art. 708 of the Code of Practice, we came to the conclusion, that the safest course to be pursued was, to discharge the subsequent general mortgages to the extent of the funds in the hands of the sheriff, in order to give to the purchaser a clear and unencumbered title.

Indeed, it cannot be pretended that the debtor is entitled to receive such surplus, and to keep it for his own use, to the prejudice of his other mortgage creditors, who, perhaps, would find no other property on which their executions could be levied, and who would have no recourse against the property sold to satisfy a debt secured by an anterior mortgage. So we held again in the case of *Fortier v. Slidell et al.*, (7 Robinson, 398,) although the features of that case, and the proceedings resorted to, were somewhat different from those of the case first above referred to. The question was not free from difficulties, and we must confess, that in approving and even adopting the course pointed out in the cases above mentioned, in the absence of any legal provision, we yielded to the suggestions of a strong sense of equity; for, it is obvious that, as under art. 708, if their remains nothing more due on the price, after paying the suing creditor, the sheriff is authorized to give to the purchaser *a release of all the inferior or subsequent mortgages*, justice and equity require that when there is a balance in his hands proceeding from the sale, such balance should be applied by the sheriff to the satisfaction, *pro tanto*, of the said subsequent mortgages according to their dates, unless ascertained to have been previously satisfied, before giving the release which the purchaser has a right to demand; nay, such release cannot be given, unless it is ascertained that nothing is to be applied to the extinguishment of those subsequent or inferior mortgages.

With this view of the rights resulting in favor of creditors from the inferior general mortgages, on the proceeds of the sale of property seized and sold by virtue of a superior one, either general or special, and of the manner in which the balance of the funds is to be disposed of by the sheriff, according to the course pursued and recognized in the case of *Fortier v. Slidell et al.*, above referred to, it follows necessarily, that the levying of an execution upon the said balance by any other creditor of the defendant, does not confer any right or privilege on said funds in favor of the seizing creditor, so long as his proceedings are in conflict with the vested rights of other creditors, who, under their general mortgage, may be entitled to a preference over him; and that, in this case, the appellees, Dawson & Co.,

whose claim amounts to upwards of \$3000, would be first entitled to recover the balance in controversy; and, in case of their having been previously satisfied, that said balance would go to Laguerenne's judgment.

But the record informs us, that Dawson & Co., long before this, issued their execution against Summers, by virtue of which they have caused other property to be seized to satisfy their judgment, and that a bond was taken in their favor by the sheriff, on the 6th of April, 1841, to an amount sufficient to cover the whole debt. The return of the sheriff on Laguerenne's execution, shows also that he has nothing to claim, as his judgment was settled between the parties, and the costs satisfied.

With regard to Laguerenne, it is clear, that he cannot set up any claim to the funds in dispute, and, therefore, his pretensions must be disregarded.

As to Dawson & Co., the evidence does not show what became of the twelve-months' bond which fell due in April, 1842, or of the property for the price of which said bond was given. We are aware, that a twelve-months' bond received by a seizing creditor, does not operate a satisfaction of the judgment, and that, if the bond be unpaid, the creditor still has his recourse against his debtor; (7 Mart. N. S. 221, and 9 La. 92;) but, for aught we know, the bond may have been paid at the time, or after it became due; or, if not paid, the property may perhaps be sufficient to satisfy the whole debt due under the bond. In either case, it would be unjust to deprive the appellant of the right by him acquired under his execution, and under his general mortgage, which is the third in rank; and we think that as, under the circumstances, Dawson & Co. before enforcing their right upon the funds in dispute, ought to show that they have vainly sought to obtain the satisfaction of their judgment, either in whole or in part, from the bond taken in their favor, or from the property which they are bound to discuss, (Code of Pract. p. 715,) justice requires, that this case should be remanded for the purpose of ascertaining the real state of the facts on this subject; for, if it be shown that they have been, or can be paid integrally, the plaintiff and appellant will then be entitled to recover the whole of the said funds, or perhaps a part thereof in proportion to the

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balance which may remain due to Dawson & Co., after discussion of the said bond and property.

It is, therefore, ordered, that the judgment of the Parish Court be annulled, and that this case be remanded to the lower court for further proceedings, with instructions to the judge, *a quo*, to inquire into the facts relative to the satisfaction of the judgment of Dawson & Co., out of the twelve-months' bond by them taken, and of the property which they are bound to discuss; to disregard the claim set up by Laguerenne; and to adjust the rights of the other parties to the funds in controversy, according to the principles recognized in this opinion; the appellees, Dawson & Co., and Laguerenne, paying the costs of this appeal.

MARIE CAMILLE WAGGAMAN v. JAMAS W. ZACHARIE and another, Administrators of the Succession of George A. Waggaman, deceased.

When the law incapacitates persons from making certain contracts, the form of the contract cannot prevent their being allowed to prove the real nature of the transaction by parol evidence, or other proof going to contradict the contents of the acts, and tending to show that the parties intended to evade the provisions of the law; as where a wife binds herself as principal, though the object was to bind her as surety, for the repayment of money received and used by her husband for his exclusive benefit.

The wife has a legal mortgage on the property of her husband, or of the community; to secure the reimbursement of her paraphernal funds, received by her husband.

Under the Code of 1808, the wife had a tacit mortgage on her husband's property, to indemnify her for any debts for which she might have bound herself jointly with him, from the day of the execution of the obligation. Book 3, tit. 5, art. 53, § 3; tit. 19, art. 17, § 3. The Code of 1825, art. 2412, having prohibited a wife from binding herself for her husband, or jointly with him, for debts contracted by him before or during the marriage, and having declared, (art. 3280,) that no legal mortgage shall exist except in the cases determined by it, the articles of the Code of 1808, relative to the tacit mortgage of the wife for her indemnification for debts contracted jointly with the husband, have ceased to be in force. Stats. 12 March, 1828; 25 March, 1828, s. 25. The fact of the marriage having been contracted before the promulgation of the Code of 1825, cannot entitle the wife to a mortgage to indemnify her for any liability for her husband, contracted since its promulgation.

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Buildings or other improvements erected by the community on the separate property of one of the spouses, belong to the latter on the dissolution of the community, who will owe to the other spouse one-half of the increased value which such improvements have added to the property. The difference between the value of the property at the time of the dissolution of the community, in the situation in which it was at the date of the marriage, and its real value, with all the improvements, at the time of such dissolution, is the measure of such increased value. C. C. 2377.

APPEAL from the Court of Probates of Jefferson, *Smith, J. R. N.*, and *A. N. Ogden*, for the plaintiff.
T. Slidell, for the appellants.

SIMON, J. This suit was instituted for the purpose of liquidating contradictorily with the administrators of the succession of George A. Waggaman, deceased, the amount which the plaintiff, who is the widow of the deceased, alleges to be due to her by the estate of her late husband, and of compensating so much of the said amount as may be found necessary, with the value of certain improvements put upon her own land and city lots by her late husband, during the existence of the community.

The claims set up by the plaintiff consist in the following sums, to wit: 1st. In the sum of \$36,000 principal, and \$7200 interest, being the amount of a debt contracted by the deceased in favor of R. D. Shepherd, for which, she states, she became surety, though in the form of a principal.

2d. In the sum of \$14,310 principal, and \$2868 interest, being the amount of two debts contracted by the deceased with the Union Bank of Louisiana for money loaned him, in which, she alleges, she was in truth the surety of her husband, although in each of the contracts she is represented as a principal, bound, *in solido*, with him.

3d. In the sum of \$50,000 principal, and \$7500 interest, being the amount of a debt of the deceased in favor of François Gardère, which she assumed as her own, in a contract signed by herself and husband, and for which, she alleges, she was in truth the surety of her husband, although a different form was given to her engagement.

4th. In the sum of \$6008, of which \$1708 was received by the deceased, in May, 1833, from the testamentary executor of her father's estate; \$500 being a part of a debt due to her father

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by the succession of Latiolais, inherited by her, and collected by the deceased; and the rest being the amount of the prices of slaves of hers sold by her husband, and received by him.

5th. In the sum of \$15,987 20, being the amount of moneys belonging to her and in the hands of her father's executor, and by him paid over to the deceased.

All which sums amount to \$139,873 26. She prays, that \$29,150 thereof may be compensated with the same sum as the increased value of her property improved during the community, and that judgment for the balance may be rendered in her favor against her husband's succession, with mortgage and privilege, &c.

The defendants first pleaded the general issue, further alleging that the deceased during his lifetime, caused to be erected, with funds of the community, extensive and valuable improvements on the plaintiff's paraphernal property, all amounting to the sum of \$70,000, money expended on said buildings and improvements; that all the buildings belong to the community, and should be applied to the community debts; and they further aver, that if the improvements belong to the plaintiff, as by her pretended, the succession should be entitled to a credit of \$70,000, to be charged against the plaintiff on account of whatever credit she may be entitled to. They pray, that the buildings and improvements may be decreed to belong to the community; that they be appraised by separate appraisements of the land and improvements; and that the proceeds thereof be divided between the plaintiff and the succession in the ratio of said improvements. But in case the opinion of the court should be adverse to the claim of ownership by the succession, they pray, that a credit of \$70,000 may be given in account to the said succession, and that a judgment for the balance may be rendered against the plaintiff, &c.

There was judgment below in favor of the plaintiff allowing compensation to the amount of \$29,150, the value of the buildings and improvements, and liquidating the balance due her by the succession of her husband, at \$110,343 20, with mortgage on all the immoveable property of the estate; and from this judgment the defendants have appealed.

From the issues presented by the pleadings, it is contended by the appellants: 1st. That the plaintiff has not satisfactorily proven

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the several amounts, which she pretends to be entitled to claim against the succession of her late husband.

2d. That she has not established her right of mortgage and privilege on the property of the deceased, or of the community.

3d. That the buildings and improvements belong to the community, and should be administered and sold by the defendants as administrators.

4th. That if the buildings do not belong to the community, but may be kept by the owner of the soil as her own, they must be paid for at their original cost.

I. Without its being necessary to review the whole evidence contained in the record, we think it proper to notice here the most important facts which the case presents. It appears that the parties were married, in 1818. In 1832, Mrs. Waggaman's father died, leaving her his sole heir. His estate was considerable, and consisted in a large mass of property which came immediately under the administration and control of the plaintiff's husband. In 1833, the testamentary executor of her father having rendered an account of his administration to the deceased husband of the plaintiff, it is shown that he (G. A. Waggaman) received a sum of money amounting to \$1708 10. He also received subsequently divers other sums of money, proceeding as well from the estate of plaintiff's father, as from the sales of several slaves belonging to the plaintiff, or by her inherited from her father, the whole amounting to \$21,645 30, which came to the hands of the deceased, and were by him received in the right of his wife, as her paraphernal funds.

It is also shown, that the plaintiff's father left an unencumbered estate; that the plaintiff had no debts of her own, never took any active part in the administration of her property, and that her husband, who had the entire control of it, had the absolute enjoyment of the revenues. He had large debts of his own, which had been partly created by buildings erected by him on the paraphernal property of his wife, although, as one of the witnesses says, "the revenues would have been sufficient to have paid all the debts and leave a surplus in money." It further appears, that in the year 1841, the deceased, who was greatly embarrassed, induced his wife, the plaintiff, to sign three several contracts of

mortgage, and a certain number of notes jointly and severally with him. The mortgage debts were contracted in favor of R. D. Shepherd, of the Union Bank of Louisiana, and of François Gardère, for the amounts mentioned in the plaintiff's petition; and although contracted for by the plaintiff in her own individual name, were, as shown by the evidence, really debts due by the husband, for which she was in truth, though not in form, his surety. This is established by all the circumstances disclosed in the evidence, and by the acts themselves, which show that the debts were created for money borrowed from the mortgage creditors. This money was used entirely to pay the husband's debts, was received by him, and nothing proves that the plaintiff ever was put in possession of any part of the sums borrowed, or that any portion thereof ever was employed for her benefit. On the contrary, we are satisfied from the evidence, that the transactions were exclusively for the benefit of the husband or of the community, that the plaintiff had no direct interest in them, and that her name was used in the acts, only with a view of binding her as her husband's surety, in the form of contracts in which she appeared as principal. This cannot be permitted; and we have often said, that when the law incapacitates persons from making contracts of a particular kind, the form of the contract cannot prevent their being allowed to prove the real nature of the transaction by parol evidence, or other proof going to contradict the contents of the acts, and tending to show that the parties intended to evade the provisions of the law. 5 Mart. N. S. 54. 7 Ibid. 341. 8 Ibid. 692; and the case of *Macarty v. Roach and another*, 7 Robinson, 357. We are, therefore, of opinion, that the rights of the plaintiff were correctly liquidated by the judge, *a quo*, at the amount for which judgment was rendered in her favor.

II. According to the jurisprudence of this court, as established in the case of *Johnson v. Pilster*, (4 Robinson, 71,) and in the case of *Compton v. Her Husband*, lately decided at Alexandria, (6 Robinson, 154,) the plaintiff is clearly entitled to her tacit and legal mortgage on the property of her husband or of the community, to secure the reimbursement of the sums which he may have received in her right as her paraphernal funds. The plaintiff appears to have renounced the community in due form, after

having caused inventories to be made in due time; and it is clear that, as to the sum of \$21,645 30, she is entitled to exercise her right of mortgage. But is it the same as to the sums which she has assumed to pay to three mortgage creditors, by the three different contracts above referred to? It is true, the parties were married in 1818, and that by the provisions of the Code of 1808, p. 332, art. 53, § 3, and p. 454, art. 17, § 3, "*the wife has a tacit mortgage on her husband's property, to indemnify her against the debts for which she has made herself liable jointly with her husband, from the day when the obligation was executed.*" But since the Code of 1824, and particularly since the law of 1828, (Bullard & Curry's Digest, pages 151 and 155,) the articles of the old Code relative to the tacit mortgage of the wife for the indemnification of the debt contracted by her jointly with her husband, have ceased to be in force, under article 3280 of the Civil Code, which declares, that "*no legal mortgage shall exist except in the cases therein determined.*" Here, the obligations were contracted in 1841, when no mortgage was allowed by law to indemnify her against such obligations. She had acquired no right under the old law, which, though prospective in its operation upon the matrimonial rights of the spouses from the time of their marriage, cannot continue to govern their contracts, or at least the effect of their contracts, made after the promulgation of a law operating a change in the rights resulting therefrom, particularly when third persons, such as, in this case, the other creditors of the husband, are to be affected thereby. The new law may, without having a retroactive effect, regulate the effect of obligations contracted posterior to its promulgation, and change at all times the consequences of eventual rights which did not exist, or were not acquired under the old law. So, we find in 14 Sirey, part 2, p. 33, a case in which it was held, that a woman, married under a law which allowed her a legal mortgage as well for her *dot* as for the increase of her *dot*, cannot claim the benefit of such mortgage for such increase, if it took place after the promulgation of the Napoléon Code, which prohibits any increase of dowry during the marriage. So, in 15 Sirey, part 2, p. 73, it was decided, that the question, whether the mortgage of the wife on the property of her husband, on account

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of the debt which he induced her to contract for his benefit, and to indemnify her against such debt, takes place from the day of the marriage, or from the day the obligations were contracted, ought to be decided by the law in force at the time such obligations were contracted, and not according to the law existing at the time of the marriage. This doctrine is certainly correct, and we think it ought to be adopted, particularly when we may fairly consider that the reason which induced our legislature not to allow to the wife, by the new Code, any legal mortgage for the indemnification of the debts which she may make herself liable to pay for her husband, and to abrogate the provision contained in the old Code, is obviously, that such obligations on the part of the wife are absolutely prohibited by the article 2412 of the new Code, as repeatedly established by the jurisprudence of this court, and that she is not bound to comply with such obligations.

The case of *Dixon v. Dixon's Executors*, 4 La. 190, relied on by the plaintiff's counsel, is very different. In that case, the rights of the spouses to the property of the community were acquired under the law in force at the time of the marriage—under a law which had begun to operate upon those rights from the moment the marriage was contracted, although the property may have been acquired subsequently; and it is clear, that those rights, which had their origin under a particular law in relation to which the parties contracted, cannot be affected by the subsequent enactment of a law abrogating or modifying the former provisions. Here again, no rights had been acquired; they were merely prospective and eventual, and they must be governed by the law in force at the time the obligations from which they are derived were executed. We conclude, therefore, that the plaintiff has no legal mortgage on the property belonging to the succession of her husband, to indemnify her against the debts which she assumed to pay under the three contracts above referred to.

III. IV. It cannot be controverted that, under the spirit of art. 2377 of the Civil Code, buildings and other improvements erected by the spouses during the marriage on the hereditary property of either, belong necessarily, *at the dissolution of the community*, to the owner of the soil, in this sense—that he may keep them, and that he owes to the other spouse a recompense of one-half of the

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value of the increase or ameliorations, to be ascertained by an estimation of the value which such improvements may have added to the property. This is in accordance with art. 1437 of the Napoléon Code, under which the doctrine has been established by several distinguished French jurists, that buildings and improvements in general, erected by the community on the separate property of one of the spouses, belong to that party, *when the community is dissolved*. Pothier, Communauté, No. 634, says: "*Ces impenses donnent lieu à une récompense, qui est due à la communauté par le conjoint propriétaire de l'héritage, sur lequel elles ont été faites.*" See also Nos. 624, 625, and 626; Paillet, on art. 1437; Toullier, vol. 12, Nos. 543, 544, *et suiv*; and Merlin, *verbo*, Récompense, sect. 1, § 2, Nos. 15 and 16. This doctrine has also been fully recognized by us in the case of *Robin v. Nolan*, (4 Robinson, 278; 6 Ibid. 508,) in which we established the rule under which the estimation of the value of the increase or ameliorations should be made, under a correct application or construction of art. 2377. We were of opinion, in that case, that the recompense was not due to the amount of the original cost; and we said that, by following the rule pointed out by us, "it would be easy to ascertain how far the increase in value of the property could be attributed to the ordinary course of things, to the rise in value of property, or to the chances of trade, since its estimation according to its value at the time of the dissolution of the community, in the situation in which it was at the time of the marriage, would necessarily include its increased value due to any thing else but to the common labor, expense or industry of the spouses, during the existence of the marriage." On referring to the record in the present case, we find that the value ascertained by the appraisements was fair and correct, and that the plaintiff has been benefitted by the increase or ameliorations of her property to the amount of \$29,150, which in consequence of her renunciation of the community, she owes to the succession of her husband, represented by the defendants.

Under this view of the questions presented by the pleadings, we come to the conclusion that, although the plaintiff has established the amount of her claims against her husband's estate in the sum of \$139,493 20, she is not entitled to her legal mort-

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gage on the property of the succession, for more than \$21,645 30; that the balance, to wit, \$117,847 90, ought to be considered as an ordinary debt, to be paid in the course of administration; that she cannot be allowed to compensate the amount by her due for the increase of her property, with that of her rights, for more than the said sum of \$21,645 30, secured by legal mortgage; and that she owes to the estate of her husband, the balance of \$7504 70, which she must pay over to the defendants, in order that the same may be applied, in the course of their administration, to the payment of the privileged, mortgage and ordinary debts of the succession, according to their rank, and among others to the satisfaction of the mortgage debts, which the plaintiff has assumed to pay for her husband to the creditors named in her petition.

It is, therefore, ordered, that the judgment of the Court of Probates be annulled; that the plaintiff recover of the succession of George A. Waggaman, deceased, the sum of \$139,493 20; that out of this sum, she be allowed to compensate that of \$21,645 30, secured by legal mortgage, with so much of the amount by her due to the estate, to wit, \$29,150, for the value of the increase of her property; that she pay the balance, to wit, \$7504 70, to the defendants, to be applied by them, in the course of administration, to the satisfaction of the debts of the succession, as expressed in the foregoing opinion; and that said plaintiff be classed in the tableau of distribution of the estate, as an ordinary creditor thereof, for the sum of \$117,847 90; reserving to her, however, the right of claiming from the administrators (in deduction of the said sum,) whatever portion of the funds of the estate which may be placed on the said tableau as applicable to the satisfaction of the mortgage debts for which she has made herself responsible, and this, by virtue of the legal subrogation to which she may show herself entitled. It is further ordered and decreed, that the costs in the lower court be paid by the succession, those in this court to be borne by the plaintiff and appellee.

SAME CASE—ON A RE-HEARING.

No judgment can be given on appeal, which the court, *a qua*, was incompetent to render.

R. N. and A. N. Ogden, for a re-hearing urged, that the court could give no judgment which the court below was incompetent to pronounce; that the Court of Probates has no jurisdiction, *ratione materiae*, of any claim against the plaintiff for a sum of money; that her consent could not have conferred it; that far from consenting, she excepted to that part of the defendants' answer which contained a claim in reconvention, and her exception was sustained, the court declaring in its judgment, that it only examined and decided upon the claims set up against her, as a defence to, or in compensation of her own claims. If it was considered by the court that she ought to pay anything, the judgment should have gone no further than to reserve to the administrators their right to claim it from her in the District Court, and to her, the right to resist the claim by showing a subrogation to the rights of the mortgage creditors.

It is not believed that it was intended by the court, that the plaintiff should pay anything; but as the language of the decree may admit of dispute, we pray that it may be amended. There is full proof in the record that the plaintiff has paid the debt to Shepherd in full, and almost the whole of the debt to Gardère.

For the purpose of subrogation, it is unimportant how the payment is made, provided it has the effect to extinguish the claim of the original creditor against the debtor for whom the payment was made. The plaintiff has shown a legal subrogation to the rights of the mortgage creditors; and the language of the decree ought to express clearly, that, in virtue of that subrogation, she is entitled to retain the sum due by her to the estate, which, if paid, could only be paid for the benefit of these very mortgages, the estate, in all other respects, having been fully settled up, and all the privileged claims paid off.

SIMON, J. The grounds upon which a re-hearing was applied for in this case, are: 1. That no judgment can be rendered against the plaintiff which the court below was incompetent to give; and that, therefore, our judgment should have gone no further than to reserve to the administrators their right to claim from her in the District Court, the balance which is liquidated by our first decision, as due by her to the succession of her husband, for the value of the improvements.

2d. That there being full proof in the record, that the plaintiff has paid the greatest part of the mortgage debts which she had assumed, and is in possession of most of the notes, she has shown a legal subrogation to the rights of the mortgage creditors; and is entitled to retain at once, the sum due by her to the estate, which, if paid, could only be paid for the benefit of those very mortgages.

I. Our judgment goes no further than liquidating the balance which the plaintiff is to pay to the defendants for the value of the increase of her property; and, although no reservation is made therein as to the administrators' right to claim and recover it, before the ordinary tribunals, we never entertained the idea that we were rendering such judgment against her for said balance as the court, *a qua*, was incompetent to give, and that our judgment was such as to authorize an execution to issue against her upon it from the Probate Court. It was necessary, in the contradictory settlement and liquidation of the rights of the parties under the pretensions of the plaintiff, to compensate the whole amount of the value of the improvements with the claims by her set up against the estate—to say what part thereof was compensated, and to point out the amount which she was to pay the defendants, “to be by them applied in the course of administration, to the satisfaction of the privileged, mortgage, and ordinary debts of the succession, according to their rank.” But as it had been intimated to us, that the object of this suit was merely to settle the rights of the parties, so as to afford them the means of bringing the succession of the plaintiff's husband to a legal and final liquidation, we had not thought it necessary to go further than to state in our decree, in what manner the rights of the plaintiff should be considered by the administrators, in making their tableau of distribution, and fixing the balance due by the plaintiff. What we had understood from the counsel, had induced us to believe, that our judgment was to be the basis of a subsequent amicable settlement of the rights of the parties. Be this as it may, it is clear, that the Probate Court could not render any final judgment against the plaintiff for any sum of money; and that we cannot give any other judgment but that which should have been rendered below.

II. It may be true, that the plaintiff has shown a sufficient

legal subrogation, and that she will be, perhaps, ultimately entitled to apply the balance due by her to the satisfaction, *pro tanto*, of her mortgage claims; but the record does not show the situation of the succession, and there may be privileged and mortgage claims against the estate of a higher rank than hers. No tableau of distribution could be filed by the administrators until the settlement and liquidation of the plaintiff's rights; and all that we could legally determine in this suit, with regard to the balance which she owes to the estate, was to reserve to her the right of claiming from the administrators, (in deduction of the said balance,) whatever portion of the funds of the estate may be placed on the tableau of distribution as applicable to the satisfaction of the mortgage debt, for which she has made herself responsible. She owes to the succession a balance of \$7504 70. This sum is to be paid to the defendants as part of the assets of the estate which they administer; and it will, perhaps, be time enough when the final tableau of distribution is filed, to ascertain what portion thereof, if any, she will be bound to pay to the defendants, and to recover which, they will be entitled to proceed against her, if necessary, before the ordinary tribunals.

Let our judgment be so amended and modified, that, instead of decreeing the plaintiff to pay the balance, to wit, \$7504 70 to the defendants, said balance be taken and considered as being the amount of the plaintiff's liability to the succession of her husband, to be applied by the defendants in due course of administration, to the satisfaction of the debts of the succession, &c.; further reserving to the defendants the right to claim of the plaintiff, before the ordinary tribunals, the whole amount of said balance, or any portion thereof which she may be found to owe to the succession, after the homologation of the final tableau of distribution of the funds and assets of the estate; and, except as herein amended, let our first judgment remain undisturbed.

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J. P. BENJAMIN, Assignee of Hermogene Brown & Co., Bankrupts, v. DENIS PRIEUR, Recorder of Mortgages for the parish of Orleans.

Decision in *Conrad v. Prieur*, 5 Robinson, 49, affirmed.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Benjamin, pro se.*

Roselius, for the appellant.

MORPHY, J. This was an application to the Parish Court by J. P. Benjamin, assignee of H. Brown & Co., for a *mandamus*, commanding the recorder of mortgages to cancel certain judicial and conventional mortgages on the property of the bankrupts, sold by the assignee, to give an unencumbered title to the purchaser. The case presents the same questions which we had occasion to consider, in the matter of F. B. Conrad, assignee of Banks, against the same defendant, 5 Robinson, 49. The decree of the lower court is in conformity with that decision, and must be affirmed.

Judgment affirmed.

THE STATE v. THE JUDGE OF PROBATES OF WEST BATON ROUGE.

RULE on the Judge of the Court of Probates of West Baton Rouge, *Favrot, J.*, to show cause why a *mandamus* should not be issued to him.

Brunot, Lobdell and Labauve, urged that the rule should be made absolute.

Favrot, J., showed cause against the rule.

R. H. Chinn, on the same side.

SIMON, J. This is an application by the defendant in the suit of *Babin v. Nolan*, for a writ of *mandamus* to the judge of the Court of Probates of the parish of West Baton Rouge, ordering him to grant to the applicant a suspensive appeal, from an order

or judgment rendered on the 14th of May last, "*directing a partition or execution of the judgment of this court so far as confirmed, and payment of plaintiff's claims, &c.*" The grounds set up in the applicant's petition, are; that the judgment or order complained of, orders an execution of the judgment heretofore rendered between the parties, so far as confirmed by this court, and notwithstanding no final decision or judgment of any kind has yet been rendered in the case as remanded; that the applicant's counsel moved for an appeal from said judgment, which was refused by the judge, *a quo*; that said judge has been guilty of a denial of justice; and that the decree of the Court of Probates, from which an appeal is sought to this court, if suffered to be carried into effect, will work an irreparable injury to the applicant.

A rule to show cause having issued, the inferior judge filed his answer thereto, in which, after indulging in a few introductory remarks on what he considers to be a proper administration of justice, he attempts to sustain the judgment complained of, by going into a detail of facts and circumstances relative to the merits of the controversy, as they took place in the lower court. He contends, however, in the course of his strictures, that the execution of a judgment of this court cannot be stayed at the will or pleasure of one of the parties, and that it is *res judicata* between them, and therefore executory.

It appears, that after the return of the mandate of this court to the court, *a qua*, in the case of *Babin v. Nolan*, lately decided, the plaintiff moved the court to order, "that a sale of all the lands, and a partition of all the slaves and other moveable property in kind, belonging to the community heretofore existing between the defendant and his late wife, be made according to law, and *in pursuance of the judgment of said court confirmed by the Supreme Court*, and that the landed property be sold according to law, for cash, to a sufficient amount to cover the portion coming to the plaintiff, as settled by said judgment." This motion was notified to the defendant Nolan, who filed his answer thereto, setting up divers matters in opposition to the plaintiff's application, in the same manner and with the same objections as if it were a new demand, and pretending that there is no final judgment under

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which an actual partition can be made, &c. All these objections were overruled by the judge, *a quo*, who sustained the plaintiff's motion *in extenso*, further ordering, that the parties be referred to a notary public to continue the partition to be made between them, and that the parish judge, and *ex officio* auctioneer, be authorized to make the sale of all the landed property, after the usual advertisements, &c.

The only question, therefore, which we have to consider on the present application, is, whether the order complained of does not go further than merely ordering our judgment to be carried into effect; for, if it decides on matters which were not then before us, it is clear that an appeal should have been granted.

On referring to the judgment of the lower court, rendered in October, 1842, which was affirmed subsequently by this court in all respects, except so far as it allowed the value of the improvements made during the marriage on the defendant's landed property, &c., and so far as it might be necessary to amend or modify it after receiving certain evidence to be produced by the defendant for certain purposes, we find that it was ordered and decreed, "that a partition be made according to law between the plaintiff and defendant, of all the property, rights and credits, moveables and immoveables held in community between them, and that the parties be referred to a notary public, to continue the judicial partition to be so made between the plaintiff and defendant." This judgment, so affirmed by us, was to be executed by sending the parties before the notary public therein named, after fixing the terms and manner in which the partition should be made, which terms and manner were to be subsequently determined by the court, *a qua*, contradictorily with the parties concerned. This was done in November, 1843; when, after considerable litigation, evincing on the part of the defendant, as we said in our last judgment, "a determination to yield to his adversary nothing but what the latter may be strictly and legally entitled to," a final judgment was rendered by the inferior court, ordering, "that the plaintiff be permitted and authorized to take in kind his share of the slaves and moveable property of the succession of his sister, in the partition which is to be made according to the former judgment; and further, that all the several tracts of land mentioned and described in the said judgment, designated therein by num-

bers 1, 2, 3, 4 and 5, and declared to constitute and form part of the community heretofore existing between the parties, be sold according to law, to operate a partition thereof between them, and that the proceeds be equally divided between said parties." This last judgment was appealed from by the defendant, who disputed the right of the plaintiff to the said partition, in the manner fixed by the judgment of the court, *a qua*; when, after a full investigation of the respective pretensions of the parties before this court, the judgment appealed from was affirmed by us *in all its parts*, except so far as it liquidated the nett proceeds of the crop of 1842, &c. See case of *Babin v. Nolan*, 6 Robinson, 508.

Now, on referring to the order of the lower court, rendered on the motion of the plaintiff after the return of our mandate for execution, we find nothing in it which may be considered as going beyond the dispositions of the judgment affirmed by us, *in all its parts*. It merely orders the partition to be made according to law, and in pursuance of the judgment affirmed by that court, appoints the same notary to whom the parties had been previously referred in a former judgment also affirmed, and names the auctioneer by whom the sale is to be made. It is true it says, that the landed property shall be sold *for cash*, to a sufficient amount to cover the portion coming to the plaintiff, as settled by the judgment; but, according to the judgment affirmed by us, the several tracts of land in community between the parties are to be sold *according to law*, which means in the manner prescribed by law, that is to say, *for cash for a sufficient amount to cover the portion coming to the party who requires it*. Civil Code, art. 1264. It seems to us, that the matters upon which the order complained of was rendered, are nothing but a repetition of those decided in the former judgment; that said order contains no new disposition or decision on the rights of the parties; that it amounts to merely ordering the execution of the decree of this court; and that the applicant is now precluded from claiming at our hands, any alteration or modification thereof, and, *a fortiori*, from opposing its execution. It is *res judicata* between the parties.

We had thought, that our judgment would have put an end to this long and protracted litigation, and that, except as to the mat-

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ters reserved in our last decree, all the various subjects of controversy which had been brought before us, had been put to rest, and particularly those relative to the state of indivision in which the parties had remained, since the death of the defendant's wife, in July, 1841. But it seems, the defendant is determined not to give up what, clearly, from our two judgments, does not belong to him. He must have known, that the right of the plaintiff to be put in possession of his sister's estate, could no longer be disputed; that the points in controversy, which are renewed by his answer to the plaintiff's motion, had all been adjudicated and settled by a judgment now beyond our power and control; that, as we said in the case of *Kohn et al. v. Marsh*; (3 Robinson, 48,) a case very similar in its features to the present one, *no one can be compelled to hold property with another*; and that, in order to come to a final liquidation of the estate in community, it is necessary that the property held in common, and which cannot be divided in kind, should be sold and converted into money. With a full knowledge of all the circumstances of his case, and of the issues upon which our judgments were rendered, it seems manifest, that the object of the applicant was to delay the final adjustment of the rights of his adversary, and to remain longer in possession of the common property. This cannot be permitted; and, however disposed this court may be to listen patiently to the complaints of parties who may think themselves aggrieved by judgments rendered by inferior tribunals, let them rest assured that we will never encourage, nor lend our aid to any attempt made with the view of embarrassing, or in any manner interrupting the course of a fair, impartial and proper administration of justice. Again, our judgment was final on the matters definitely settled thereby; and we are of opinion that the judge, *a quo*, acted correctly, in refusing to grant an appeal from the interlocutory judgment ordering its execution.

The rule is, therefore, discharged.

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THE SECOND MUNICIPALITY OF NEW ORLEANS v. GEORGE
A. BOTTS and another.

Owners of real estate in the second Municipality of New Orleans cannot be compelled to pay any portion of the cost of paving done in front of their property, unless such paving was directed to be done by a special ordinance of the Municipal Council, after notice given to those interested, that they might have an opportunity of opposing its passage. Stats. 8 March, 1836, s. 11; 20 March, 1840, s. 7. Ord. of 2d Municipality of New Orleans of 2 May, 1836. Where paving has been done on the mere order of the chairman of the committee on streets and landings, a subsequent ordinance providing for the payment for the work, though it may be considered a ratification by the council of the acts of the chairman, cannot bind those who had no opportunity of opposing the execution of the work by showing that it was unnecessary.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Rawle*, for the appellants.

G. B. Duncan and *Preston*, for the defendants.

L. C. Duncan, for the intervenor.

SIMON, J. The object of this action is to recover of the defendants, the sum of \$1447 26, with interest, being the amount of one-third of the cost of paving the street with stone, completed on the 6th of April, 1841, in front of lots belonging to the defendants. It is alleged in the petition, that the said paving, extending 322 feet 1 inch, in front of the lots on the north side of Richard street, between Constance and Magazine streets, was done by the plaintiffs *in conformity with their ordinances*; that a duly certified account thereof is recorded in the office of the recorder of conveyances; and that the defendants have promised to pay the said sum of money. The petition prays, that judgment be rendered for the amount sued for, with privilege on the lots, &c.

The defendants answered by pleading the general issue.

During the progress of the suit, one Eliza Zellweger, a mortgage creditor of the defendants on the property described in the petition, obtained leave to intervene, to resist the pretensions and claims of the plaintiffs, and to unite with the defendants in endeavoring to defeat the demand. The grounds of opposition by her set up are: 1st. That the pretended claim of the plaintiffs is

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founded on work alleged to have been done to property of the defendants, in virtue of ordinances of the Council, when in truth there never was any ordinance authorizing the particular work described in the petition, which, if ever done, was done in violation of law, and was not demanded by public convenience, utility, or necessity, but merely for private purposes to accommodate the proprietors of an adjoining cotton press.

2d. The judgment being asked by way of privilege on the property in front of which the work is alleged to have been done, the intervenor avers, that the same was mortgaged to her by an authentic act, passed on the 19th of March, 1840, to secure a loan of \$18,000, and that to enforce said judgment by privilege, would injure the rights of the intervenor, who had no knowledge thereof, having been expressly advised to the contrary by the certificate from the mortgage office. She prays, that if there be judgment in favor of the plaintiffs, the privilege claimed may be disallowed and rejected.

The judge, *a quo*, being of opinion that there was no ordinance authorizing the work to be done, and that the property of the defendants cannot be assessed to pay for said work, rejected the plaintiffs' claim; and from that judgment, the plaintiffs have appealed.

The record contains an admission that the mortgage executed by the defendants in favor of the intervenor, was duly made before a notary, on the 19th of March, 1840; and that it appears from the certificate from the mortgage office of the same date, annexed to the mortgage, that there were no encumbrances recorded in said office against said defendants on the property described in the mortgage, and which is the same property in front of which the Municipality charge, in their petition, to have done the work for which that suit is brought.

The evidence shows that the paving was done *under an order of the chairman of the committee on streets and landings*, and has been paid for by the Municipality. The order alluded to is signed by the chairman, and orders the city surveyor "to proceed to pave Richard street as far as Magazine street, using the materials of the corporation." This order is dated, 26th of March, 1840.

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It appears also, that by a resolution of the Council approved on the 22d of April, 1841, the treasurer was directed to pay the balance due to the contractor for having paved Richard street, between Magazine and Constance streets; and that a written description of the defendants' lots, with a statement of the cost for paving said streets, was duly recorded in the office of the register of conveyances, in accordance with the 7th section of a law of 1840, (B. & C.'s Digest, 131,) for the purpose of acquiring the privilege therein mentioned. This recording was made on the 17th of February, 1842.

A copy of an ordinance of the Council of the Municipality directing, that "*the committee on streets and landings shall be charged with the consideration of all subjects connected with paving, &c.*" adopted on the 2d of May, 1836, was also produced in evidence by the defendants, to show the authority of the chairman of the said committee in giving the order to pave Richard street; but the ordinance says, that "*the committee shall report thereon to the Council,*" and it does not appear that any report was made to the Council on the subject in controversy, nor that the order given by the chairman to the city surveyor, was the result of any report of the committee adopted by said Council, or even of any action of said committee on the necessity of paving the street in front of the defendants' lots.

From this evidence, we are not prepared to say that the judge, *a quo*, has erred. By the 11th section of the act of 1836, (B. & C.'s Digest, p. 124,) each of the Municipalities therein created, is to have *the exclusive right to make all improvements to the streets*, public squares, wharves, &c.; and by the law of 1840 above referred to, it is provided, "that whenever the owner of any property, in front of which paving shall be done *by order of the Council of the Municipality* within which it is situated, shall fail to pay the third part of the cost of said paving, as he is bound to do by the existing laws, &c." Under these laws, and under those regulating the manner in which the streets of the city of New Orleans are to be improved and paved, it is manifest, that no street is to be improved or paved, or any other work done, which is to produce an assessment on the property of individuals, unless an ordinance has been passed by the Council for that pur-

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pose, and unless notice has been previously given to those who may be interested. Indeed, if it were otherwise, it would result, as is very properly remarked by our learned brother of the Commercial Court in his judgment, that the property of individuals might be subjected to heavy assessments unnecessarily, and at the instance of interested persons, and by their intrigue. The law has left that part of the administration of the Municipality, exclusively under the control and discretion of the Council. It should be exercised within the strict and proper meaning of the law; and nothing but an express and special ordinance of the Council, passed with a full knowledge of all the circumstances which may require its adoption, and after having given to those who may be interested, an opportunity of opposing its passage, can authorize the performance of the work, and the recovery of the portion of the cost which the neighboring proprietors are bound to contribute under the existing laws. Here, it is alleged in the petition, that the work was done in conformity with the ordinances of the Council, and yet no evidence has been adduced to show that such an ordinance was passed. The proof that the paving was done under an order of the chairman of the committee on streets and landings, is clearly insufficient to entitle the plaintiffs to recover. What authority had the chairman to order the work to be done? Under what circumstances was the order issued? The very ordinance, under which the committee derives its power to *consider all the subjects connected with the paving of the streets, &c.*, requires the committee to *report thereon to the Council*; and we may fairly presume, that the object of this requirement was, that the Council may be enabled to obtain sufficient information upon which its ordinance may be founded, whenever it becomes necessary to pave a street, or to order any other work recommended by the report of the committee.

With regard to the ordinance authorizing the payment for the work, we agree with the judge, *a quo*, that it cannot sustain the plaintiffs' action. It may perhaps be considered as a ratification by the Council of the acts of the chairman of the committee and of the city surveyor; but it cannot bind the defendants, who had no notice thereof, and who were deprived of the opportunity of opposing the performance of the work, by showing that it was

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uncalled for by any of those who were to contribute, or that it was unnecessary.

Judgment affirmed.

GEORGE HARRISON v. THOMAS C. POOLE and another.

Where the holder of a promissory note, who had commenced an action against the makers, releases, on the trial, one of his co-debtors, *in solido*, in order to use his testimony, but without expressly reserving his recourse against the other, the latter will be discharged. C. C. 2199. And where in such a case, the release erroneously recites that a judgment had been obtained against the witness, from all liability under which it releases him, the fact that no judgment had been rendered is immaterial, the plaintiff evidently intending by releasing the supposed judgment to release the debt itself.

✓ **APPEAL** from the City Court of New Orleans, *Collens, J.*

C. K. Johnson, for the appellant.

Vason, contra.

MORPHY, J. This suit, which is on a promissory note for \$700 drawn to the order of the plaintiff, has already been before us. See 4 Robinson, 192. It then appearing from the evidence, that this note had been given to the petitioner by Thomas C. Poole, the managing partner of the firm in New Orleans, under circumstances somewhat suspicious; and there being an averment on the part of Thomas E. Allen, the other partner, residing in New York, who was sought to be made liable on it, that the note had been made fraudulently and without consideration, the case was remanded to afford the plaintiff an opportunity of introducing additional evidence to show what consideration had been given. On the return of the case to the City Court, Thomas C. Poole being offered as a witness in the case, and the judge having rejected his testimony on the score of interest, the plaintiff executed a release in favor of Poole, discharging him of all liability towards him under a judgment, alleged in the instrument to have been rendered against him in the case. The witness was sworn, and the trial proceeded, when, about the close of it, the defendant

filed a peremptory exception, pleading his discharge, and the extinguishment of the debt sued for, by reason of the release granted to his late co-partner and co-debtor, against whom the plaintiff had prayed for a judgment, *in solido*, with him, the defendant. This exception was sustained, and judgment was rendered below in favor of the defendant; whereupon the plaintiff appealed.

The testimony of Thomas C. Poole, which was taken on the second trial, is not much calculated to remove the suspicions which attach to the transaction, and which induced us to remand the case. It would not have much weight with us, were we to go into an examination of the merits of this controversy; but this becomes unnecessary, as we agree with the judge of the first instance, as to the effect of the release granted by the petitioner to Thomas C. Poole, the co-debtor, *in solido*, of Thomas E. Allen, his late partner. The release given to one of two co-debtors, *in solido*, discharges the other, unless the creditor has expressly reserved his right or recourse against the latter. Civil Code, art. 2199. Both of the defendants in this suit were, therefore, discharged by the release thus given to Poole, without any reservation of Harrison's rights against Allen. The circumstance of the release mentioning, that a judgment had been obtained in the suit against Poole, when in fact none had ever been rendered, does not, in our opinion, render the release less valid and binding on the plaintiff. He clearly intended to release Poole from all liability for the demand or debt sued for, which he, or the person who drew up the release, believed to have been sanctioned by a judgment. The use he made of this release to discharge the interest of Poole in the suit, and to make him a competent witness, clearly shows, that in remitting the judgment, he intended to include in such release the debt or demand upon which the supposed judgment was based, otherwise the interest of the witness would have remained unaltered. After thus using this release, and showing his own understanding of its nature and purpose, the plaintiff cannot be permitted to get rid of its effects, by availing himself of an error of fact made in drawing it up. If, when he offered to file this release, it had been objected to on account of this erroneous statement in it, there can be no doubt that he

 Quimper, Tutor, v. Bierra.

would have instantly corrected it, so as to make it conformable to the true state of the facts.

Judgment affirmed.

ISIDORE ANTOINE QUIMPER, Tutor of Antoine Molinari and others, Minors, v. LOUIS BIERRA.

Where a debtor, who has made a surrender of his property, but has not been discharged from his debts, afterwards acquires other property, the only mode to subject such property to the payment of those debts, is by opening the proceedings on the cession, and obtaining an order from the court in which they were pending to force a new cession. This may be done by any one of the old creditors; but they have no claim against him, unless he has property more than enough to discharge all debts incurred by him since his surrender, and to support himself and family; and any portion which may be liable for the old debts, must be abandoned for the benefit of all the former creditors. No one of them can sue and obtain judgment against him, and seize and sell such new property in satisfaction of his claim. Stat. 20 February, 1817, s. 28. C. C. 2173.

Art. 2173 of the Civil Code, which authorizes any one of the creditors of an insolvent who has made a surrender of his property but not been discharged from his debts, to force a new cession, on showing that the debtor has acquired property more than sufficient for his maintenance, is not repealed by the 5th sect. of the stat. of 28 March, 1840, authorizing any two judgment creditors whose claims exceed a certain amount to coerce a forced surrender, that section having no application to the case provided for by art. 2173.

APPEAL from the City Court of New Orleans, *Collens, J.*

J. Seghers, for the appellant. An insolvent is not absolutely protected against suits for debts anterior to the surrender of his property. 1 Mart. N. S. 11. He may waive this benefit, if entitled to it. The inferior judge was, therefore, wrong in deciding a case on an exception personal to the defendant, and not pleaded by him.

Preaux, for the defendant, cited Civ. Code, art. 2173. Code of Pract. art. 92. Bul. & Curry's Dig. p. 214, ss. 3, 5. 3 La. 334. 4 La. 45.

SIMON, J. The petition alleges, that the defendant having failed in the Parish Court of New Orleans, on the 10th of May, 1823, and having filed his schedule accordingly, acknowledged

himself therein to be indebted to Antoine Molinari, then living, in the sum of \$822, by endorsements; that the defendant has never been discharged from his debts, and has never paid the above sum to the deceased, or to his heirs; and that said defendant, having come to better fortune, is bound by law and equity to pay the claim sued on, resulting from three promissory notes, to wit, one for \$200, and two others, each for \$311, all drawn in 1822 by one Joseph Segura, to the order of, and endorsed by the said Louis Bierra. Wherefore, he prays for judgment against the defendant for the said sum, as principal, with interest since 1823.

The defendant joined issue, first pleading the prescription of five, ten and twenty years; and further averring, that he has not more property than sufficient and indispensably necessary for his living.

The presiding judge of the City Court, being of opinion that the only judgment he could render, would be one commanding a new cession of property by the insolvent, to be followed by a distribution among his new and old creditors; and conceiving that such a judgment would be beyond the jurisdiction of his court, nonsuited the plaintiff; from which judgment, after a vain attempt to obtain a new trial, the defendant has appealed.

We think the judge, *a quo*, did not err. By the 28th section of the law of 1817, (B. & C.'s Digest, p. 492,) it is provided, "that the surrender of property shall only exonerate the debtor to the amount of the property surrendered, and, in case the said property should have been insufficient, if he acquires other in future, *he shall be bound to abandon it until final payment*; provided that his new creditors shall be preferred to the former for their payment on the new property." Article 2173 of the Civil Code provides, that a cession of property discharges all the debts on the debtor's *bilan*, if a majority of his creditors agree to such discharge; "but if such consent be not obtained, *any one of his creditors may afterwards force a new cession* on showing that the debtor has acquired property over and above what is necessary for his maintenance." It is perfectly clear from these laws, that the legislature never intended that an insolvent debtor should be exposed to be harrassed with suits, after a *cessio bonorum*,

even in case of his acquiring new property ; and that the only mode to be resorted to, in case of the debtor's coming to better fortune, is to open the proceedings of the former surrender, and, in the words of the law, to force him to make a new cession. This may be done by *any one of the old creditors*, without the necessity of instituting a suit against him, and, as it may be considered as a continuation of the former proceedings, it is obvious that they must be carried on before the same court that was originally vested with the jurisdiction of the case. In the case of *Goicochea v. Ricarte*, 4 La. 45, this court said : " When a debtor makes a cession of his goods, his anterior creditors have no claim on him unless he has a sufficiency of goods to discharge debts incurred since the cession, and a sufficiency for the subsistence of himself and family ; and then *the newly acquired property must be abandoned, for the benefit of all the creditors, and ought not to be seized for the benefit of a single creditor.*" See also 3 La. 334. We have never understood that every creditor should be at liberty, after the insolvent has acquired new property, to sue him and to obtain judgment against him, by virtue of which the new property might be seized and sold in satisfaction thereof. The newly acquired property belongs to the *concurso* of creditors ; and, whenever the debtor is required to make a new cession thereof by any one of them, this must take place after having ascertained the amount of his new debts, to be first satisfied, and the extent of his means of subsistence, and the property newly surrendered must be disposed of, and the proceeds thereof distributed, contradictorily with the new creditors, according to the provisions of the law. Such proceedings, we believe, must be had before the same court where the original surrender was made, and where the *concurso* is pending ; and, at any rate, the court, *a qua*, had no jurisdiction to order them. Laws of 1836, p. 193, § 1. Code of Pract. art. 92.

We have been referred to the 5th sect. of a law of 1840, (B. & C.'s Digest, 473,) under the pretence that it authorizes the present action, as it is therein enacted, that no person can be forced to make a surrender, unless by two creditors, *having each personally obtained a separate judgment* for an amount exceeding \$300 ; and that, therefore, the law of 1817, and the art. 2173 of

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the Code have been so modified, as now to require two judgment creditors to force the new surrender therein provided for. The law referred to has, in our opinion, no application to a case of this kind. It provides for the mode of compelling a debtor, who appears to possess no property, but who is believed by two or more of his judgment creditors to have property, rights or assets of some description, within the State of Louisiana, which may be available to his creditors, to surrender the same to his creditors; and, in such a case, the proceedings had are to be conducted as provided for by the insolvent laws. But here, as we have already said, the new surrender which may be required by any one of the insolvent's old creditors, is necessarily a continuation of the first cession originally voluntary, and cannot be applied for and ordered, unless, according to the provisions of the law, the debtor has acquired new property over and above what may be necessary for his subsistence and that of his family. The law of 1840 requires *two judgment creditors* at least, to coerce a forced surrender from an apparently insolvent debtor; but the law of 1817, and the Civil Code, only require *one of the anterior creditors* to compel the insolvent to bring into the mass the newly acquired property for the benefit of all his creditors. There is, it seems to us, no inconsistency between the two laws, as it is clear they were made for different objects.

Judgment affirmed.

THE NORTHERN BANK OF KENTUCKY v. JAMES H. LEVERICH
and another.

Where a bill had been lost, but the drawees promised the owner to pay the amount out of the proceeds of property expected to be received from the drawer, and sufficient property was afterwards received by them, the acceptance became absolute on the receipt of the property. The drawer could not countermand his order, after the acceptance, though before the delivery of the property, so as to discharge the acceptors, without the consent of the owner of the draft.

Where a lost bill was accepted verbally, with a knowledge of the fact of its loss, and the acceptors have treated with the plaintiffs as the holders, proof by a witness of the acknowledgment of the drawee that he had transferred the bill to the

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plaintiffs, is sufficient evidence of their title. In such a case slight evidence of title should suffice. *Per Curiam*: The acknowledgment of the drawee is not hearsay, but rather the admission of a party to the bill. It would, perhaps, not be good evidence, because secondary, if the bill itself could have been produced. Where a bill of exchange has not been protested, interest is due only from judicial demand.

APPEAL from the District Court of the First District, *Buchanan, J.*

R. H. Chinn, for the plaintiffs. In the case of *Miln v. Prest*, 4 Campb. 393, it was decided, that where the language used on the presentation of a bill for acceptance could be considered as importing a promise to accept on the arrival of a certain cargo, on proof of the arrival of the cargo, the drawee would be bound. The only question in this case is, whether in a suit by the holders against the acceptors, proof of the acknowledgment by the endorser of the genuineness of his signature, can be excluded as hearsay. The court below correctly decided, that it could not be excluded on that ground.

Lockett and Micou, for the defendants. There is no evidence of the transfer to the plaintiffs of the bill sued on. The signature of *Vertner, the payee, must be proved*, before recovery can be had against the defendants. 2 Rob. 304. Bayley on Bills, (ed. 1836,) pp. 485 to 489.

The court should be strict in this case, as there is *no evidence* of the loss of the draft sued on, except the *statement* of Frey, that the plaintiffs *informed him*, Frey, as cashier of the Union Bank, that they had sent him such a bill. Is this sufficient evidence of loss, under our law? See Civil Code, art. 2258. There was no advertisement as required by law, and no security offered.

The court below erred, in giving interest from 9 December, 1841. The bill was not protested, and there is no evidence of any demand of payment at the date when it became due. Interest can only be claimed from judicial demand, to wit, from 21st November, 1843.

BULLARD, J. The plaintiffs allege in their petition, that about the 6th of May, 1841, one A. T. Bowie, drew a bill of exchange on J. H. Leverich & Co. in favor of Daniel Vertner, or order, for fourteen hundred dollars, payable seven months after date, which bill was transferred by Vertner to them before its maturity, and remitted to the Union Bank for collection; but that the same was lost, and, upon application by their agents, the said Leverich & Co. assumed and promised to pay the same out of the proceeds of property of the drawer in their hands, whereby they became

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liable as acceptors for the said amount, when the amount should be realized out of property of the drawer, which was subsequently done; and that they have failed to pay the same, though demanded.

The defendant, James H. Leverich, in answer to interrogatories on facts and articles, admits, that he was advised by Bowie, that he had drawn a bill on J. H. Leverich & Co. and requested them to pay it, but such advice did not come to hand till several months after drawing the bill; that, about the 10th of February, 1842, he received a letter from Bowie informing him that he was about to ship cotton to his house, and directing them to pay the bill in question. This letter he exhibited to Major Tilford and Mr. Frey, and acting as the agent of Bowie, he did promise to pay the said bill out of the proceeds of said cotton, to be shipped as stated in the letter. That the cotton arrived about the 21st of February, 1842, and the owner, Bowie, came with it, and countermanded the order given by his previous letter; that on the day of his arrival, he, Leverich, called on Major Tilford, and informed him, that Bowie had directed him not to pay the draft, and at the same time told him, that Bowie was in New Orleans, and that he, Major Tilford, had better see him, and arrange it between themselves, and at the same time told Major Tilford that J. H. Leverich & Co. would not pay the draft. Major Tilford, at that time, lodged at the St. Charles Hotel, as well as Bowie, and he, Leverich, apprised him of the fact, and they both remained in New Orleans several days afterwards. Major Tilford was president of the Northern Bank of Kentucky, and was their agent. He further admits, that the cotton shipped was sufficient to pay the draft; but he paid the proceeds of the same to Bowie, or his order.

The above statement is substantially corroborated by the testimony of Frey.

The promise to pay the bill out of the proceeds of cotton which should be received, was a conditional acceptance of the bill of exchange, and that acceptance became absolute on the receipt of a sufficient amount by the defendants, unless they were discharged by the notice given by Leverich to Tilford, as above stated. It cannot be admitted that a drawer can countermand a draft

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accepted, so as to discharge the acceptor, without the consent of the holder. Leverich ought not to have received the cotton on consignment, if he was not willing to pay the draft out of the proceeds. The order of Bowie could not release him from that obligation. But it is said, that the president of the bank, who was at the same time its agent, was notified of this new order of Bowie not to pay his draft. This is true, but it cannot be fairly inferred that he, by his silence or inaction, assented to the release of Leverich from his conditional obligation; because, although he was the president of the bank and agent at the same time, it does not appear that he had authority from the corporation to release Leverich from his contract; and certainly, without such consent, either express or implied, he could not rid himself of his obligation. No such consent in our opinion is shown.

But the appellants contend, that there is no evidence of the transfer of the bill, and that the signature of Vertner, the payee, must be proved before a recovery can be had. A witness testifies that Vertner admitted that he had transferred the bill to the plaintiffs. The circumstances of the case are peculiar. The bill never came to hand. The acceptance was given with a knowledge of that fact. The defendants are not, therefore, parties to the bill by a written acceptance, and consequently run no risk of its being presented hereafter; nor is it possible to prove the endorsement in the ordinary mode. The defendants treated with the Bank of Kentucky as the holders, and, under these circumstances, slight evidence of the title of the plaintiffs ought to suffice. The acknowledgment of the drawee, that he had transferred the note, appears to us sufficient, and not liable to any objection. It is not hearsay, but rather an admission of a party to a bill, and would, perhaps, not be good evidence, because secondary, if the bill itself could be produced on the trial. The declaration of Vertner would prevent him from ever recovering the amount of the bill of exchange as holder.

Interest was allowed by the judgment, from the 9th December, 1841. In this, we think, there was error, as the draft was not protested. It should have been given only from judicial demand.

The judgment of the District Court is therefore reversed; and and it is further ordered and decreed, that the plaintiff recover of

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James H. Leverich & Co., fourteen hundred dollars, with five per cent. interest from the 21st of February, 1843, the day of the judicial demand, with costs in the District Court, those of the appeal to be paid by the appellees.

ALEXANDER DENNISTOUN and another v. JOHN S. WALTON.

A lease made by the riparian proprietor of a *batture* lying between the public road and the river in front of his land, cannot be annulled by a lessee who has not been disturbed in the enjoyment of the property, on the ground that the premises leased are a portion of the bank of the river, the use of which is free and not susceptible of being leased. The space between the public road and the *levée* is private property, to the exclusive use of which the owner is entitled; and he may use the part which extends from the *levée* to the river, subject to the regulations of the municipal authority, provided he does not prevent the use of it by others; and he may confer upon a lessee the same right. C. C. 446.

The Civil Code, art. 2652, recognizes the validity of the lease of another's property, by declaring that he who leases the property of another warrants the enjoyment of it against the claim of the owner. The principal obligation of the lessor is, to maintain his lessee in the quiet enjoyment of the thing, and, while he is undisturbed, he cannot gainsay the title of his lessor; the object of the contract being the use of the thing.

APPEAL from the District Court of the First District, *Buchanan, J.*

E. Briggs, for the appellants. The 446th article of the Civil Code, classes amongst things for common use, the banks of navigable rivers, *reserving* the right of property to the front proprietor. The 448th article declares, that on the river Mississippi, the *levée* shall form the banks. The 661st article characterizes this right as a servitude. The 745th article declares, that estates subjected to servitude, may be further subjected to others, provided that the second does not interfere with the first. The 749th article declares, that donations of this kind are to be construed strictly, in favor of the donor and against the donee; which doctrine is supported by *Toullier*, vol. 3, p. 420, No. 654.

The right then ceded to the public, is a servitude, and the language of the Code, in art. 446, points out the sort of right which it intended to vest—such temporary appropriations of another's land to one's own use, as the nature of river navigation, or the use of what is strictly public, might make absolutely necessary. It

leaves the ownership charged with this servitude in the party, who would, but for this burden, be absolute owner of the soil ; and we contend, that it leaves him empowered to do and exercise all acts of ownership not inconsistent with the fair and free exercise of the right reserved. If this doctrine be correct, it certainly gives the owner the right to delegate to others the right which he himself possesses ; and it would seem to follow, as a necessary consequence, that this delegation of his rights may form the basis of a contract. The lessee takes the property subject to the servitude, and it is for him to see, that in exercising the privileges the lease confers upon him, he does no act whereby the servitude given by the Code is impaired, or its free exercise interfered with. If he obstruct the enjoyment of this privilege, his acts may be abated ; and the possibility of such abuse of his power is no argument against its existence. The same objection could be raised against the power of the proprietor over whose land a right of way exists ; or, in fact, in the case of any servitude ; and there is no distinction made by the Code, nor can any exist, in reason, between a privilege of this kind, given by law, and one that has been created by convention. The power given, or presumed to be given, by the 661st article to the police jury, cannot affect the nature of this right ; it can neither qualify, extend, nor abridge it. Such as the Code gave, the privilege must exist, though the police jury may declare perhaps, as they have done in Jefferson, the limits over which this privilege shall extend ; and the action of this body can in no way affect the principles for which we are contending.

This question is not open to discussion. The Supreme Court, in the two cases of *Chase v. Turner*, (10 La. 20,) and *Nichols v. Byrne*, (11 La. 173,) have expressly admitted the existence of a right to lease. In the first case, batture with other land, formed the subject of the contract ; in the latter, it was batture land alone ; and the decision of the court in both cases, sustained the landlord's claim under circumstances far different from those which characterize the present case. There, the object for which the land was taken, was defeated by the exercise of legal power ; here, there has been no eviction,—no trouble of any kind. A quantity of wood was seized upon the land, more than sufficient to satisfy the claim ; and it was not until, by the leniency of the owners of the soil, the rent had fallen in arrear, that any objection was urged to the power to lease.

The more recent decision of this court, does not affect our position. It merely decided, that permanent establishments, which not only *interfered* with the exercise of a servitude, but rendered its *enjoyment utterly impracticable*, could not be maintained ; and to the soundness of this doctrine we cheerfully subscribe.

But we contend, that if the reservation of ownership confers upon the riparian proprietor the slightest possible right, that right can be conferred upon another; and that it matters not how small, or how much encumbered the exercise of that right may be, provided the lessee elects to take it at a price,—he becomes lessee, *cum onere*, but not one tittle the less accountable to the party from whom he takes the right, because he cannot exercise dominion in a way which his landlord never was supposed to guaranty that he should.

Under the decision of *Tippet v. Jett*, (10 La. 362,) it is not in the power of this lessee to contest the right to lease. In the quiet and undisturbed possession of all he bargained for, he cannot now dispute a right which, in accepting the lease, he formally acknowledged.

Trudeau, on the same side.

Peyton and I. W. Smith, for the defendant. The property was *batture*, and not susceptible of being leased. The ordinances of the police jury of Jefferson, not having been offered in evidence, could not be legally noticed by the court.

J. C. Clarke, on the same side.

BULLARD, J. This controversy commenced by a seizure for rent. The defendant makes opposition, claims the nullity of the lease on the ground that the property leased is a *batture*,* and, in reconvention, prays for the restitution of rents already paid by mistake. The court declared the lease null, and the plaintiffs have appealed.

The lease is of the *batture* lying between the public road and the river, in front of the plaintiffs' tract of land in the parish of Jefferson, opposite to *Livaudais*, having four acres of front, to be used by the lessee as a coal and wood yard, at forty dollars per month. The defendant does not pretend that he has been disturbed in the enjoyment of the property for the purpose for which it was leased; but he contends, that the property is a portion of the bank of the river, the use of which is public, and that, consequently, it is not susceptible of being leased for private use.

That the use of the banks of navigable rivers is public, although the soil belongs to the riparian proprietor, and that this use is regulated by municipal authority, is well settled. It follows,

* The plaintiffs had also prayed that the lease might be annulled,

that the owner cannot himself enjoy the bank in such a way as to prevent its common enjoyment by all, as regulated by article 446 of the Civil Code—that is to say, to bring vessels to land, to make them fast to trees, to unload, to deposit goods, to dry nets, and the like. But, in the present case, there is a part of which the public has not necessarily the use. The lot leased extends from the public road to the water's edge. Whatever space there is between the levée and the road is private property, and the owner is entitled to the exclusive use of it. With respect to the part which extends from the levée to the river, the owner may use it, provided he does not prevent the use of it by others, as regulated by the article of the Code above referred to, and in conformity to the police regulations.

Our learned brother of the District Court assumes, that the police regulations of the parish of Jefferson, are a part of the law of the land, and that the court is bound to notice them without proof of their enactment or promulgation, and that by one of their regulations, a space of sixty feet only from the water's edge, has been reserved for the use of the public. If this be so, then the parties contracted with a view to such reservation, and, if there be more than sixty feet, the lease is clearly valid. Be this as it may, the owner has clearly a right to enjoy his property in a modified form, provided he conforms to the regulations of the police jury, and he may confer upon a lessee the same right.

In *Chase v. Turner*, we held, that it was not a legal excuse for non-payment of rent, that by a city ordinance the lessee had been prevented from using the batture in front for cutting up boats and rafts. 10 La. 19.

The case of *Nichols v. Byrne* is analogous to the present. The plaintiff had leased a piece of land, fronting on the river, for the purpose of cutting up fire-wood, &c., but was soon afterwards notified by the wharfinger to desist from using the leased premises for that purpose, in virtue of a city ordinance, in consequence of which the lessee complained that he had been dispossessed. He claimed damages, and that his notes given for the rent should be cancelled. The court held, that the city regulations extended to all lessees and landholders, and that if the ordinance was unlawful

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the lessee could protect himself; if lawful, he had no right to complain. 11 La. 172.

In the present case, it is clear, that the whole of the premises is not devoted to the public use, and the lessee does not complain of having been disturbed. He stands in the place of the owner, as to the enjoyment of the property in a manner not inconsistent with the police regulations of the parish. The Code seems to recognize the validity of the lease, even of another's property, by declaring, that he who lets out the property of another warrants the enjoyment of it against the claim of the owner. Article 2652. Pothier, *Contrat de Louage*, No. 20. Oblig. 133. The principal obligation of the lessor is to maintain his lessee in the quiet enjoyment of the thing, and while he is undisturbed, he cannot gain-say the title of his lessor. The object of the contract is the use of the thing. *Tippet v. Jett*, 10 La. 359.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that the plaintiffs recover of the defendant one thousand and forty dollars, with interest at the rate of five per cent from the 23d December, 1843, and costs in both courts; and it is further adjudged, that the lease be annulled.*

* THE counsel for the defendant, in an application for a re-hearing, urged, that the court erred in supposing that the cases of *Chase v. Turner*, (10 La. 19,) and of *Nicholls et al. v. Byrne*, (11 La. 172,) are analogous to the present. In the case of *Chase v. Turner*, the property leased is described as "a parcel of land, situated on both sides of New Levée-street, in Fauxbourg Delord, and running to the Mississippi," &c. In that case, a large part of the property, not being the bank of the river, was susceptible of private use, and could be the subject of lease. In the case of *Nicholls et al. v. Byrne*, the statement of facts by the reporter is not clear, but the court in its opinion declares the facts to be similar to those of *Turner v. Chase*, and the law to be the same. By an examination of the original papers on file in the parish court, it will be found, that the leased premises are described, as a tract of land lying on the Mississippi, having a front of one hundred feet, and of an irregular depth; and there are no measurements given in the record to ascertain the rear boundary. Then it cannot be disputed, that a material difference in facts distinguished the present from the cases cited. In the present, the leased premises are confined to the bank of the river. In the cases cited, the leases comprise the bank of the river, in connexion with land in the rear, that was susceptible of private use.

The court also erred, in laying any stress on the principle, decided in the case of *Tippet v. Jett*, (10 La. 362,) viz. that a tenant cannot dispute his landlord's title;

EDWARD WILLIAM SEWELL v. ALFRED HENNEN, Syndic of the creditors of John Willcox, an insolvent.

ALFRED HENNEN, Syndic, &c. v. EDWARD WILLIAM SEWELL.

The certificate of a recorder of mortgages declaring that no mortgages exist on certain property, is *prima facie* evidence that none exist. The burden of proving the contrary, is on the party who contests the correctness of the certificate. Where a contract between a mortgagor and his mortgage creditors recites, that the former "shall be at liberty to sell any part of the mortgaged property, on paying to their agent a proportion of the purchase money equal to the proportion which the whole mortgaged security bears to the whole mortgage debt, and that thereupon their agent shall release the mortgage on the property so sold," the agent is authorized to release the mortgage only in the event of his having previously received the stipulated portion of the price of the part so sold.

Where in the sale of property subject to mortgages, it was stipulated that the mortgages should be erased within the shortest delay, and that the notes given for the price should be deposited with the cashier of a certain bank there to remain till the erasure of the mortgages, when they were to be delivered to the vendor, a demand, made on the vendor personally at his domicile, to comply with his obligation to erase the mortgages, is sufficient to put him *in mora*. It was not necessary to make any demand of the cashier at the bank.

APPEALS from the District Court of the First District, *Buchanan, J.*

Lockett and Micou, Benjamin and Grymes, for the appellants. The certificate of a recorder of mortgages that no mortgage exists

and on the principle that the lease of another's property may be valid. Here we do not dispute the landlords' title. On the contrary, we admit them to be the riparian proprietors; but contend, that the property is put to a use of which it is not susceptible—that being the bank of the river, it cannot be made the subject of a lease—maintaining the principle that the *levée*, the bank, and the bed of the Mississippi, are by law dedicated to public use. Vide Civil Code, arts. 446, 448. *Pully & Erwin v. Municipality*, No. 2, 18 La. 278. *Morgan v. Livingston*, 6 Mart. 216-229. *Shepherd v. Third Municipality of New Orleans*, 6 Rob. 349. The use of the word "*batture*," in the lease, as descriptive of the property, is conclusive as to the fact, that the premises leased are the bank of the river, the term *batture* being only applicable to alluvion that is washed or beaten by the water, which must, therefore, be land beyond the *levée*, and exposed to the action of the stream. Vide *Morgan v. Livingston*, quoted above. Whenever alluvion is protected by the *levée* from the water, it ceases to be *batture*.

Re-hearing refused.

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on particular property, is only *prima facie* evidence of the fact. It may be rebutted. *Dreux v. Ducournau*, 5 Mart. 625. *Lafarge v. Morgan*, 11 Mart. 518. The authority to release being conditional, and the condition not having been complied with, the release was null, and there was no proof of any subsequent ratification.

McHenry, for the syndic.

BULLARD, J. The contract of sale, which the plaintiff Sewell seeks to rescind by the present action, contained the following clause or condition ;—after reciting the existence on the lots sold, of various mortgages, special and judicial, the act proceeds : “ and which said encumbrances, the said John Willcox hereby obligates himself to pay and raise, in the shortest delay ; and to assure the said purchaser that the same shall be complied with, the said Willcox hereby agrees, that the notes, or the money therefor, given in payment for said property, shall be deposited in the hands of Raboteau, the cashier of the Improvement Bank, and there remain until the encumbrances as herein recited shall be erased from the records of the office of the recorder of mortgages of this city, and a clear certificate to that effect produced to said cashier, who shall then deliver said notes or money to the said Willcox, or his order.” The deed bears date the 19th of January, 1837, and the last note was payable two years after date.

The vendor having made a surrender to his creditors, Alfred Hennen was appointed their syndic.

On the 17th June, 1843, the plaintiff Sewell, addressed a letter to his vendor, in which he demands of him to cause the mortgages to be erased according to the stipulations of their contract, and tendering and offering to pay the full sum due according to the contract, and to perform all the obligations imposed on him by said act, on his complying with the demand contained in the letter, and informing him that if he should fail to comply with the demand within three days, suit would be brought to rescind the sale.

Willcox, in answer, writes to the plaintiff, that his affairs had passed to Alfred Hennen, Esq., as syndic under the law, and that he had fulfilled all his (Willcox's) obligations towards him, the

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mortgages having been raised, and a clear certificate from the recorder of mortgages obtained and presented to him and to the bank. He is, therefore, requested to hand over the money to Mr. Hennen.

The syndic at the same time writes to the plaintiff, in answer to the same letter, that he had caused the mortgages to be duly cancelled, and he exhibits to him a certificate of the recorder of mortgages to that effect; he further informs him, that he is ready to comply with all the stipulations in the act of sale, and to receive the purchase money.

Two days after the date of this last letter, the syndic writes again, and informs the plaintiff, that if any reasonable or possible doubt can exist as to the correctness of the cancelling of the mortgages, he is ready to give good and sufficient real security that it shall be ratified by all the parties; and that he is ready to receipt for the money, and distribute it under the order of the court in payment of the creditors, who will be fully satisfied.

After these preliminary demands and notices, which clearly amount to a putting in default under the Code, according to our interpretation of it in the first suit to rescind this same contract decided last year, (5 Robinson, 83,) this suit was instituted, demanding that the contract should be rescinded and annulled.

The syndic answers, that the mortgages in question have been duly raised, the conditions of the contract complied with, and that the plaintiff justly owes the purchase money.

This action was commenced on the 13th July, 1843.

On the 20th of the same month, the syndic took out an order of seizure and sale against the lots, to make the money secured by the same mortgage, on representing to the court, that the mortgages outstanding at the time of the sale had been extinguished, and producing the notes given by Sewell for the price, and a certificate of the recorder of mortgages that the same no longer existed on the records of his office.

The execution of this order of seizure was arrested by an injunction, which was granted upon the opposition of Sewell on the following grounds:

1st. That a suit was already brought, and then pending, to rescind the contract of sale.

2d. That no sufficient authentic evidence was adduced to authorize the issuing of the order of seizure and sale.

3d. That the debt had been extinguished; that the notes in question were given for the price of the lots, which were encumbered with mortgages to an amount exceeding their value; that Willcox obliged himself to raise said mortgages in the shortest delay, and that the price was not due nor demandable until after the same should have been cancelled and extinguished, which has not been done by any person having authority to do so; that, consequently, the sale is null, and the property reverted to Willcox, and he tenders possession of the same.

4th. That the certificate of the recorder of mortgages was obtained by unlawful means, the recorder having been induced by the syndic, and one Paul Tulane, and Lucius C. Duncan, to grant it, when in fact, the said parties were not in law authorized or empowered to grant the discharge for the parties whom they assumed to represent, nor to require the erasure of the mortgage.

5th. Because the possession of the notes was obtained by unlawful means. That by express agreement they were to remain in deposit in the hands of Raboteau, cashier of the Improvement Bank, until the mortgages should be legally raised and cancelled, whereas they have not been raised and cancelled, but the possession of the notes acquired by presenting said certificate so improperly issued and obtained.

Thus both cases, in the nature of *cross* actions, present the same questions. They were tried by the same court, and judgments were rendered in each at different times, in one case dissolving the injunction, and for the defendant in the action of rescision; and Sewell has appealed from both judgments. They have been argued together in this court.

Two questions alone appear to us necessary to be examined. First, whether the evidence offered on the trial shows, that the mortgages which Willcox engaged to raise and extinguish, have been so raised and extinguished by competent authority; and, secondly, whether the syndic has been put legally *in mora*, so as to authorize the plaintiff to maintain his action to rescind the contract of sale.

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I. The certificate of the recorder of mortgages is undoubtedly *prima facie* evidence, that no mortgage exists in the name of Willcox upon the lots, and, consequently, that he has complied with his contract. It is, therefore, incumbent on Sewell to show, that the certificate was given in error, and that the recorder erased the mortgages without sufficient authority. 5 Mart. 625. 11 Ib. 462.

The evidence upon which he proceeded, is before us in the record. It is contained in an act passed before W. Y. Lewis, notary public, between Josiah Barker, represented by his attorney in fact, Jacob Barker, Paul Tulane, as duly authorized by the trustees of John Willcox and Jacob S. Barker of New York, by power dated the 10th day of October, 1834, and deposited in the office of Carlisle Pollock, on the 15th day of November, 1831, Lucius C. Duncan, attorney at law and of record of Clark and others for a judgment rendered in the United States District Court, in March, 1836, for \$16,778 25, and Alfred Hennen, syndic of the creditors of Willcox. This act enumerates various mortgages which had existed on the lots in favor of different persons, but especially that in favor of Clark, Hunt and Phillips, of New York, trustees of the creditors of Willcox and Barker, for about twenty-five thousand dollars, and a general judicial mortgage resulting from the judgment above mentioned, and duly recorded. The parties then declare, that they do release and discharge the above recited encumbrances and mortgages, including the special one in favor of Josiah Barker, given to indemnify him as surety of Willcox on an appeal bond; and they authorize the recorder of mortgages to erase the same from the records of his office. It is further agreed, that Hennen, the syndic, shall collect whatever money could be realized from the sale of the property sold by Willcox to Sewell, and from the endorsers of Sewell's notes and otherwise from Sewell, and that he shall divide the same among the parties to this release, and interested therein, rateably in the same proportion as the proceeds of the sale would be divided by the sale of the sheriff, under proceedings under said mortgages, extending previous privileges of the parties to the *fund* in lieu of the *property*.

The authority of Tulane is shown by the contract between

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Willcox and the trustees of his New York creditors, and is the same instrument which gave rise to much discussion between the parties in the case of *Willcox v. His Creditors*. See 2 Robinson, 27.

The clause in that instrument which is relied on as showing Tulane's power to release the mortgages, is as follows: "And it is further agreed, by and between the said parties hereto, that said Willcox is to be at liberty to sell any part or portion of the real estate so placed under the mortgage, on his paying to the said trustees, or their attorney or substitute, a proportion of the purchase money equal to the proportion which the whole mortgaged security bears to the whole mortgage debt, and that *thereupon* the said parties of the first part, or their attorney or substitute, shall release or extinguish the mortgage, lien, or encumbrance, on such property so sold."

That Tulane was the agent of the trustees is abundantly shown by the testimony of Mr. Duncan who proves, that he has for a long time acted under the power of attorney. But the question is not whether he was agent, but rather, what was the extent of his authority, and whether the clause in the contract above recited gave him the power to release or extinguish the mortgage, without receiving previously some part of the price for which the property might be sold. The agency of Tulane was not questioned in the case of *Willcox v. His Creditors*. In that case we held, that his principals were not liable in damages to Willcox, in consequence of Tulane's having refused, in that instance, to release the mortgage on another part of the property, which Willcox had sold, without having previously received a part of the price. His authority to do so *on that condition*, was not contested.

But much reliance is placed by the counsel for the appellee upon the following expressions used by the court, in *Lafarge v. Morgan et al.*: "That the certificate of the register of mortgages might be contradicted; but to destroy the credit attached to it, the party who attacks its verity must do more than offer proof which leaves that verity doubtful. He must show it to be false. He must show, that the officer acted on evidence that was untrue; not merely that which was irregular." 11 Martin, 462.

It is certainly true, that the *means* by which the recorder becomes satisfied of the extinction of a mortgage is of little importance, if it turn out on trial that such was the fact, even if he should act upon verbal and *ex parte* statements. But if it should turn out upon investigation, that the fact was otherwise, or, in other words, that the statements were *untrue*, then the certificate will not avail. So, if a person assuming to act as agent for the mortgagee, authorizes the register to cancel the mortgage, and it should turn out upon investigation, that he was not the agent for that *purpose*, and to *that extent*, then the evidence upon which the register should have proceeded would be untrue, and the case come strictly within the principles settled in the case of *Lafarge v. Morgan et al.*

But it is said, that the trustees ran no risk; and that the arrangement is favorable, and even most advantageous to them. This may be true, but it is for them to judge of it, and not us. In the present case, the fund in the hands of the syndic for distribution may be perfectly safe, and a change of the *lien upon the lots*, to a *privilege on the price*, may offer as ample guarantees to the creditors, as to retain the mortgage until they shall have received a part of the price. But the parties have a right to stand upon their contract; and, in the present controversy, each appears disposed to hold the other to the strictest law. The authority given to Tulane to release the mortgage on such parts of the property as Willcox might sell, appears to us to be a conditional one, and depended upon his having previously received a part at least of the price. It was that view of the contract which we took in the case of *Willcox v. His Creditors*, and that construction saved the creditors, in the shape of damages, the whole amount of the debt. If a ratification had been shown, it would have been quite different; but when an agent has acted beyond the scope of his authority, we cannot presume that his act will be ratified.

II. But it was further urged in argument, that Willcox, or the syndic, has not been put legally in default, and that the demand should have been made of Raboteau, at the Improvement Bank.

We are not of this opinion. The notes, it is true, were to remain on deposit, and Sewell had the faculty, by the contract, of paying his notes and the money was to remain in deposit until

the mortgages were all released. But it does not follow, that any demand on Willcox, with a view to a rescision of the contract, was to be made at any other place than at his domicile, and personally.

The counsel asks for a delay under article 2042 of the Civil Code, which provides, that when the resolutory condition is an event not depending on the will of either party, the contract is dissolved of right ; but in other cases it must be sued for, and the party in default may, according to circumstances, have a further time allowed for the performance of the condition ; and he is confident that, within a short time, a ratification of the act of Tulane can be procured. Even admitting that this case comes within the principle established by that article of the Code, yet it appears to us, that the circumstances attending this transaction do not authorize us to extend the delay. It is seven years since the sale took place, and the vendor engaged, in the shortest delay, to cause all the mortgages to be released. He escaped last year a judgment rescinding the contract at the suit of Sewell, upon grounds exclusively technical, and so technical, that it is not easy to give a common sense reason for the conclusion to which we came ; and we could only say, and say it too with an expression of regret, *sed ita lex scripta est*. The same party now brings himself, by his previous demand and offer on his part to comply with his contract, within the rigid and shadowy interpretation which we thought ourselves compelled to give to those provisions of the Code, and we do not think ourselves authorized to require him to give any further delay. He has a right to stand upon his contract, more especially as there has not been a partial performance on the part of the trustees ; nor indeed could there be, as the vendor engaged to release all the mortgages—an obligation essentially indivisible.

It is, therefore, ordered, in the first case of *Sewell v. Hennen, Syndic of Willcox*, that the judgment of the District Court be avoided and reversed, and that the contract of sale, set forth in the petition, be rescinded and annulled ; that the defendant restore to the plaintiff his promissory notes given for the price of said property ; and that the defendant pay the costs of both courts. And in the second case of *Hennen, Syndic, v. Sewell*, it is further ordered and decreed, that the judgment of the District Court

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be reversed ; and ours is, that the injunction be reinstated and made perpetual, at the costs of *Hennen, Syndic*, as aforesaid ; and that he also pay the costs of this appeal.

FERNANDO LEMOS v. FRANÇOIS DAUBERT and another.

Where one to whom a slave has been adjudicated at public auction, discovers that the slave is affected with a redhibitory disease, he may decline to complete the purchase.

APPEAL from the District Court of the First District, *Buchanan, J.*

D. Seghers and *Buisson*, for the plaintiff.

Bodin and *L. Janin*, for the appellant.

Grivot, Roselius, and *Canon*, for the other warrantors.

MARTIN, J.* This is a redhibitory action, in which the plaintiff seeks to rescind the sale of a slave, whom the defendant caused to be put up at auction, and who was adjudicated to the plaintiff, the slave laboring under a redhibitory malady.

In a supplementary petition, the plaintiff avers, that Marie, the wife, separated from bed and board from Thomas Chasagne, was the real owner of the slave, and that the original defendant was her agent in the sale, a circumstance which has come to his knowledge since the filing of the original petition, and that they both colluded to defraud him. He therefore prays, that she may be made defendant, and that he may have judgment against both, *in solido*.

The wife pleaded the general issue, and reconvened on the plaintiff for the price at which the slave was adjudicated to him. She called in her vendor Durapau, who called in his vendor Montz, who called in his, Destez, by whom the suit was defended. The claim for damages was abandoned by all parties ; the sale to the plaintiff was rescinded ; Marie Chasagne, his vendor, had judgment against Durapau, who had judgment against Montz, and this last against Destez, who appealed.

The case was tried by a jury. The testimony shows, that

* MORRIS J., having been of counsel in this case did not sit on its trial.

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the plaintiff discovered, shortly after the adjudication, the unsoundness of the slave, and that he gave notice of it to the auctioneer, and of his declining to complete the purchase. This was communicated to the original defendant. The plaintiff lodged the slave in jail, at the risk and charge of her owner. The original defendant had her sold at the plaintiff's risk. The disease appeared to be what the doctor who examined her calls, a grave swelling on one of her thighs, on which a scar showed that a surgical operation had been performed; and, on the testimony of a doctor, by whom she was examined at the request of the plaintiff, the jury came to the conclusion that her malady was a redhibitory one.

The court came to the same conclusion, as it refused to grant a new trial. It does not appear to us that it erred.

It is, therefore, ordered and decreed, that the judgment be affirmed, with costs.

SAME CASE.—ON A RE-HEARING.

Where the defendant in an action to rescind the sale of a slave on account of a redhibitory defect, alleges, in her answer, that the defect complained of was an apparent one, the allegation will preclude her from recovering against her vendor cited in warranty.

A sale cannot be rescinded for a redhibitory defect, proved by the defendant, or admitted by the plaintiff, to have been an apparent one, or one known to the purchaser at the time of the purchase. C. C. 2497, 2498.

Bodin and L. Janin, in their application for a re-hearing, cited 6 Mart. N. S. 539. *Lebesque v. Bonin*, 3 Robinson, 12. *Hawkins v. Brown*, *ibid.* 310. Civil Code, arts. 2497, 2498.

SIMON, J. We have granted the application, made by the defendants' warrantors for a re-hearing in this cause, on divers grounds, the most important of which, in our opinion, grows out of the answer of the defendant to the plaintiff's petition. It is contended by the applicants, that the defendant Chasagne is not entitled to any recourse in warranty under the sale from Charles Durapau to her; as it is admitted in her answer, that the defect

complained of by the plaintiff, was such as to be discovered by simple inspection. Hence it is argued, that this admission or allegation shows, that she was herself precluded from instituting a redhibitory action against her immediate vendor, because she knew the existence of the defect at the time of the sale; and that, taking her call in warranty as in the nature of a redhibitory action, it is clear, that with such admission or allegation, it could not be maintained; that she had nothing to claim against Durapau; and that, therefore, the subsequent warrantors must also be discharged.

The answer of the defendant to the plaintiff's redhibitory action contains the following averment: "*and this defendant further says, that the defect complained of by plaintiff is an apparent disease, which gives no room to redhibition.*" All the successive warrantors, except Destez, who denies all knowledge, seem to admit also that the defect was an apparent one; and moreover it is shown by the testimony of one Dr. Dupierris, that Durapau, intending to purchase the slave, had called upon him to examine her, and was advised by him not to purchase her, as she had every indication of a scrofulous disease and a swelling in the abdomen. The malady was then in existence, and notwithstanding the physician's warning, Durapau told him that he intended purchasing the slave, as he could get her very cheap.

Now, under art. 2497 of the Civil Code, "apparent defects, that is, such as the buyer *might have discovered by simple inspection*, are not among the number of redhibitory vices;" and art. 2498 provides that, "the buyer cannot institute the redhibitory action, on account of the latent defects which the seller has declared to him before, or at the time of the sale." See also, 3 Robinson, 12 and 319. It results from these articles that, if the defendant in a redhibitory action, shows that the defect was an apparent one, or that the plaintiff knew of its existence at the time of the sale, the action must fail, and the plaintiff's demand be rejected. If so, how would it be in an action in which the plaintiff admits or alleges the existence of the defect *as an apparent one which gives no room to redhibition*; or in which it should be shown, that the plaintiff insisted on buying the slave, notwithstanding his discovery of the disease, and the advice of

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his physician not to buy? Surely, the action would be defeated on the mere reading of the petition in the first case, and rejected as unfounded in the second. So it must be in the present case, as between the defendant Marie Chasagne and her warrantor Durapau, and also as between Durapau and his vendor Montz; and on a further consideration of the case, we have come to the conclusion, that the judgment appealed from ought to be maintained only with regard to the cancelling of the sale as claimed by the plaintiff against the defendant, and that the parties successively called in warranty should be discharged from all liability.

It is, therefore, ordered, that our former judgment, so far as it affirms the judgment appealed from as between the plaintiff and Marie Chasagne, be maintained; and with regard to the parties successively called in warranty, it is ordered and decreed, that the judgment of the District Court be avoided and reversed; that the claim set up by said defendant against her vendor Durapau, for damages, be rejected; and that our judgment be in favor of all the parties called in warranty, discharging them from liability by reason of their respective sales; the said defendant paying the costs in both courts.

THE UNION BANK OF LOUISIANA v. WILLIAM E. THOMPSON.

In an action, by a bank against the surety in a bond given by one of its officers for the faithful discharge of his duties, it is the exclusive province of the jury to ascertain whether the principal had been guilty of official neglect, and to what extent; but plaintiffs have a right to require the court to charge the jury, as to the nature and extent of the legal obligations of the defendant under his bond.

One who has bound himself as surety for an officer of a bank in a bond, the condition of which recites that, the principal "shall well and truly perform and fulfil all the duties incumbent upon him by virtue of his office, or such other as may be assigned to him, or shall pay to the bank such damages or losses as it may incur by reason of the unfaithful performance of any of the said duties of said office," will be liable for any loss which the bank may sustain in consequence of any negligence of the principal, gross or slight, in the discharge of his official du-

The Union Bank of Louisiana v. Thompson.

ties. The liability of the surety is not restricted to losses resulting from the unfaithfulness or dishonesty of the principal. C. C. 1924, 1935.

The surety of an officer of a bank, sued by the bank for the amount of certain notes which plaintiffs alleged that they had been compelled to pay to the holders, in consequence of the neglect of the principal to have them protested at maturity as it was his official duty to do, whereby the endorsers were discharged, may show in reduction of damages, that the parties were liable notwithstanding the want of protest, or were insolvent when the notes matured. It was the duty of the bank, before paying the amount of the notes, to ascertain whether it was necessary to have had them protested. If the parties were insolvent at the time no loss can have been sustained from the want of protest, and the holders could not have recovered against the bank, nor can the surety be made liable to the latter for more than the injury really sustained by the holders of the notes.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Denis*, for the appellants.

Benjamin, Peyton and *I. W. Smith*, for the defendant. The defendant cannot be held liable for a mere oversight of the party for whom he was surety. This has been decided in New York. See 10 Johnson, 271. But if the surety was liable, he has been discharged by the failure of plaintiffs to give defendant reasonable notice thereof. Plaintiffs were guilty of gross *laches*. No attempt was made by them for nearly two years, to collect the notes; and the payment of their amount to the holders must be considered to have been made at their risk.

SIMON, J. The Union Bank of Louisiana sues the defendant as the surety of one John Popham, on the bond given by the latter to secure the true and faithful performance of his duties as a note clerk of the said bank, to recover of him, the defendant, the sum of \$11,240 87, alleged to be the aggregate amount of sundry notes and obligations received by Popham in his said capacity for collection, and kept by him in his possession until after they were due, by reason of which the endorsers were discharged, and the bank had to pay and indemnify the bearers. The action is based on the gross neglect and fraudulent conduct of Popham, in the discharge of his duties as note clerk.

The defendant, admitting his signature to the bond sued on, pleads the general issue.

This case was tried before a jury, who returned a verdict in favor of the defendant; and a judgment having been rendered

thereon by the court, *a qua*, after overruling the plaintiffs' application for a new trial, the latter appealed.

The record shows, that John Popham was appointed note clerk in the Union Bank, in April, 1836, and that the defendant signed his official bond as surety. The condition of said bond is, "that Popham *shall well and truly perform and fulfil all the duties incumbent upon him*, by virtue of his said office as note clerk of the said bank, *or such other as may be assigned to him*, or shall well and truly pay into the said bank such damages or losses as the bank may incur by reason of the unfaithful performance of any of the said duties in said office."

It appears from the evidence, that Popham's duty as note clerk was to receive all notes for collection that are deposited in bank, or remitted from foreign banks; to enter them in a book called the *tickler*; and to cause them to be protested at maturity, if dishonored. It was also his duty to register all notes for collection, endorse them, and return them to the cashier when payable out of town. In the months of March, April and May, 1837, a certain number of notes and bills were given to Popham by the cashier. They had been received from foreign banks, and were to be collected by the Union Bank on account of its correspondents. These notes fell due in April and May, and in June the cashier received letters from the banks which had remitted the bills and notes for collection, inquiring as to their payment. On referring to the books, it was found that no entries had been made of these notes; and, on search being made, they were discovered and found in a drawer of the bank used by Popham, which was opened by a key in the possession of the assistant note clerk, and during Popham's absence. A list was made by order of the cashier by one of the witnesses, who states, that he put down all the notes and bills found in the drawer. This list was made on the next day after the drawer was opened, and is made a part of the evidence. The bank thereupon paid the amount of the notes and bills to their correspondents, by whom they had been forwarded or remitted for collection.

It appears, also, that in February, 1839, (this suit having been brought in May, 1838,) it was agreed on record by the parties' counsel, that the officers of the bank should take the steps neces-

sary to collect the notes, bills, &c., which are the subject of this controversy, and that, on the day of the trial of this cause, (12th January, 1841,) the plaintiffs' counsel discontinued the action as to six notes, amounting together to the sum of \$5498 65.

The questions which this case presents grow out of the charges of the judge, *a quo*, to the jury, on the two principal points in controversy.

1st. On the legal construction of the bond given by the defendant as surety, which his counsel pretends does not render him responsible for a mere neglect or forgetfulness of the clerk, but only for his fidelity and honesty.

2d. On the right of the bank to recover of the surety, without having given him notice on discovering Popham's fault, and without having taken the necessary steps to collect the notes, or at least ascertain the fact before paying the whole amount to the correspondents whether any protest had been really necessary on the notes, or whether any of the parties had been discharged by reason of the want of protest.

I. The plaintiffs' counsel requested the court to charge the jury that, "*if they were of opinion, from the evidence, that the plaintiffs have sustained any loss by the negligence, gross or slight, of Popham, in the discharge of his duties as note clerk, his surety, the defendant, is liable for such loss, under the bond which he has subscribed.*" But instead of this charge, which the judge, *a quo*, refused to give, he told the jury, "that whether the acts of Popham, which were complained of, were or were not breaches of the bond, was a matter for the jury to decide upon, and the court left it entirely to them."

We think the charge complained of was insufficient, and that it was the duty of the judge to state his views to the jury, on the nature of the legal obligations contracted by the defendant in becoming Popham's surety on his official bond. It is true, that the nature and extent of the duties which Popham was to perform as note clerk, are matters of fact which are to be ascertained by the evidence; but the question whether the defendant is responsible as surety for the losses sustained by the gross or slight negligence of his principal, is a question depending entirely upon the legal construction of the condition of the bond; and although it

is exclusively the province of the jury to answer to the question—has the defendant's principal been guilty of neglect, and to what extent, in the discharge of his duties,—it was clearly the duty of the judge to instruct them, whether or not, under the bond sued on, the defendant was, in his opinion, legally responsible for the consequences of such neglect. The plaintiffs' counsel had a right to call upon the court for a charge to the jury on the nature and extent of the legal obligations of the defendant under the bond sued on, and the judge ought, in our opinion, to have complied with this request, and not to have left the legal question entirely to the jury.

On the question itself, we feel disposed to say, that the charge called for was correct; and we cannot accede to the proposition that, under the conditions of the bond, the defendant became only responsible for his principal's fidelity and honesty. The expressions used in the bond, to wit, "*that if the said J. P. shall well and truly perform and fulfil all the duties incumbent upon him as note clerk, &c.,*" show that the bank in appointing him, had in contemplation not only that he should be faithful and honest, but that he should also perform and fulfil such duties as were imposed upon him by the nature of the business for which he was employed. It is also a principle of law, that the obligations of contracts extend to whatsoever is incident to such contracts, and that they may be violated, either actively, by doing something inconsistent with the obligation it has imposed, or passively, by not doing what was agreed to be done, or not doing it at the time, or in the manner stipulated or implied from the nature of the contract. Civil Code, arts. 1924, 1925. And it is no excuse for the officer, or his surety, when sued for the injurious consequences of his negligence in the exercise of his duties, to say, that he has only been guilty of a mere neglect or forgetfulness, and that he has never ceased to be faithful and honest. We cannot admit that an officer may neglect or forget the performance of his duties with impunity, when such neglect or forgetfulness becomes injurious to his employers; and it seems to us clear, that the bond sued on was taken with a view to protect the bank, not only against dishonesty and infidelity, but also against the consequences of the negligence of its officer. Such negli-

gence operated a breach of the bond, and the judge, *a quo*, should have charged the jury accordingly.

II. The second charge complained of by the plaintiffs' counsel is in these words: "If the Union Bank, (the judge undoubtedly meant to say the defendant,) could have shown that the parties were liable notwithstanding the want of protest, or that the parties to the notes or bills were insolvent, or, if the defendant could now show it, the payment of them by the plaintiffs did not render the surety liable therefor, and the defendant is now at liberty to show these facts, or to prove the insolvency of the parties in reduction of damages; and that, under these circumstances, the payment by the plaintiffs would be in their own wrong."

This charge appears to us correct. It was undoubtedly the duty of the bank, before paying the amount of the bills or notes, to ascertain whether there was any necessity for their being protested to bind the parties thereto; for if they were insolvent at the time of the protest, or at the periods when they were to be protested, it is clear that no loss had been sustained for want of protest. This the defendant was properly permitted to show, so as to obtain a reduction of the damages sued for, which, it is well settled, cannot go beyond the extent of the injury really sustained by the owners of the bills or notes; and we agree with the judge, *a quo*, in the opinion, that said defendant cannot be made liable for the payment made by the plaintiffs in their own wrong. Surely, the holders of the bills had no right to recover, if it was ascertained that, from the insolvency of the debtors, no loss had been sustained from the want of protest; and it would be unjust to throw upon the defendant a responsibility which the bank had never legally incurred, or which, on investigation, may be shown to have been without any object. Our ideas upon this subject are well expressed by the charge of the inferior court; and in the same manner as the defendant is entitled to be credited for any sum collected by the bank on the bills and notes, which, from the solvency of the drawers or acceptors have been recovered, so he has a right to obtain a reduction of the damages claimed, to the amount of those due by persons who were insolvent at the time that said bills and notes should have been protested.

The objections to the other charges have not been insisted on

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by either party; and they have appeared to us proper and correct; but, as the jury were not sufficiently instructed by the charge first above noticed, we think justice requires that this case should be remanded for a new trial.

It is, therefore, ordered, that the judgment of the Commercial Court be annulled and reversed, and that this case be remanded to the lower court for a new trial, with instructions to the judge, *a quo*, to charge the jury in the manner and according to the legal principles expressed and recognized in this opinion; the costs of this appeal to be borne by the defendant and appellee.

JOHN NICHOLSON, Syndic of the Creditors of G. W. Pritchard
& Co., Insolvents, v. CHARLES A. JACOBS.

No action can be maintained by the syndic of an insolvent estate to recover from a third person the amount of certain notes given for the price of property belonging to the estate, on the allegations that the notes were illegally obtained by defendant from a former syndic, with full knowledge that the latter had no authority to dispose of them and that he did so in fraud of the creditors of the insolvent, and that the amount of the notes was received by the defendant, where it is neither alleged nor proved that the former syndic has failed to account for the proceeds of the notes nor that any account has ever been demanded of him.

APPEAL from the Commercial Court of New Orleans, *Watts, J. T. A. Clarke*, for the plaintiff.

Grymes, for the appellant. The facts of this case are as follows. In 1840, Geo. W. Pritchard was appointed syndic of his own creditors. In September of that year, the two notes sued for in this case were discounted by the defendant, at the instance of an exchange broker, without any knowledge or information for whose account, or for what purpose, they were discounted. The notes at the time they were discounted, were endorsed by the payees in blank, and afterwards by "Geo. W. Pritchard, Syndic." The plaintiff was afterwards appointed syndic of the creditors of Pritchard, and now sues to recover the notes, or their proceeds, from the defendant, to whom the broker had passed them.

The question is, whether a note discounted in the market un-

der such circumstances, or its proceeds, can be recovered from the holder.

The defendant insists, that there was no circumstance attending the transaction, which could justly excite his suspicions. The notes were already negotiable by delivery, having been endorsed in blank by the payees.

The only circumstance relied on by the plaintiff, is the existence of the word *syndic*, after the name of Pritchard, on the back of the note, as second endorser. That circumstance alone was not sufficient to excite a suspicion that the note was to be negotiated in fraud of the creditors, because : 1st. Fraud is never to be presumed. 2d. The syndic is the confidential agent of the creditors, elected or chosen by them ; and the presumption was, that he had passed the note off in the due execution of his trust, and that he had been properly authorized to do so. 3d. Syndics give surety as required by law, upon whom recourse may be had in case they fail to account. 4th. The word *syndic* after the name, indicated nothing. It was only a word of description, which could not bind the estate, and is not, *per se*, a badge of fraud. This case cannot be distinguished in principle from that of *Fusilier v. Bonin*, 12 Mart. 235, and *Canfield v. Gibson*, 1 Mart. N. S. 143.

The judgment must be reversed, for it is not alleged or proved, that Pritchard had defrauded his creditors, that he had failed to account, nor that, on accounting, he was a defaulter ; nor that any account had even been demanded of him. Suppose he should render a just and true account, when demanded,—on what grounds could the present syndic demand the notes or money from the present defendant ? He surely would not be permitted to enrich the insolvent estate at the expense of the defendant, without showing that the estate had sustained loss or injury by his fraud or negligence.

MORPHY, J. The plaintiff, suing as the syndic of the creditors of George W. Pritchard and of G. W. Pritchard & Co., represents, that the said Pritchard, formerly syndic of his own creditors and of those of G. W. Pritchard & Co., caused to be sold certain property surrendered by them, and received in payment certain notes, among others, one of \$1433 33, drawn by S. & J. P. Whitney to the order of and endorsed by Palmer & Johnson, dated March 25, 1840, payable three years after date ; and another of \$1333 33 drawn by Edward Yorke, to the order of and endorsed by Charles Ogden, dated the same day, and payable two years after date ; that the said Pritchard, without au-

thority, and not in discharge of any of his duties as syndic, but in fraud of the creditors of the estate which he administered, placed said notes in the hands of Charles A. Jacobs, who received them, well knowing that Pritchard had no right or authority so to deliver them to him, and that he did so in fraud of the creditors. He further avers, that Jacobs has received payment of the note drawn by S. & J. P. Whitney, and that he still holds the note drawn by Yorke, but refuses to pay over the proceeds of the one, or to surrender the other. He, therefore, prays for judgment for the amount of the note paid, and for the note unpaid, or its amount, with interest and costs. The defendant pleaded the general issue. There was a judgment below against him, from which he has appealed.

The evidence shows, that in September, 1841, Pritchard placed the two notes in question in the hands of John Kilty Smith, a broker, to be sold; that they were purchased by the defendant at a discount of twelve per cent per annum; and that at the time he took them, they were endorsed "*G. W. Pritchard, Syndic*," and bore the usual *paraph* of the notary who executed the sales with which they are identified. Whitney's note was paid at maturity; that of Yorke was put in suit by Jacobs, and payment obtained by the seizure and sale of the property mortgaged.

The new syndic rests his right to recover the amount of these notes upon the fact, that the endorsement "*G. W. Pritchard, Syndic*," which was upon them when they were offered to Jacobs, informed him they were held by Pritchard in that capacity; that a syndic has no authority to transfer notes belonging to the estate which he represents, without an order of the court under which he holds his appointment; that when Jacobs took the notes with this endorsement, he was bound to inquire into the authority of the syndic to negotiate them away; and that, not having done so, he has made himself liable for their amount to the creditors. The doctrine is well settled, that if an agent tortiously converts the property of his principal—if he sells, or pledges it, to a third person, without right or authority, the latter will be liable to the principal, if he knew or participated in the illegal or unauthorized act of conversion. Whatever may be our opinion as to the liability of the defendant, under the circumstances disclosed by

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the evidence in this case, an objection is made to the petitioner's right to recover, which, in our opinion, is fatal. It is not alleged in the petition, or shown, that G. W. Pritchard is a defaulter in his capacity of syndic, that he has failed to account, or even that an account has ever been demanded of him. He may, when called upon, render a true and faithful account, in which event, although his act may have been unauthorized, there will have been no conversion to his own use of funds belonging to the creditors. If the latter have not suffered any injury or loss, they have no right to complain. For aught that appears in the record, Pritchard may have since accounted for the amount of these notes. No recovery against the defendant can be had, unless it be shown that the estate represented by the petitioner has sustained loss or injury, in consequence of the defendant's fraud or negligence. Under the circumstances, we think that justice requires, that this case should be remanded, to afford the plaintiff an opportunity of amending his petition, and making the averments and proofs necessary to establish his right to recover.

It is, therefore, ordered, that the judgment of the Commercial Court be reversed, and that this case be remanded for further proceedings; the plaintiff and appellee paying the costs of the appeal.

JOSEPH R. MILLER v. THE NEW OLEANS CANAL AND BANKING COMPANY.

A judge has no right to state to the jury his own conclusions drawn from the law and evidence in the case. Such expressions of opinion are calculated to have an undue weight with the jury.

To ascertain whether one employed by a corporation to superintend and direct the construction of a canal, had authority to enter into a particular contract relative to labor to be done in its construction, on behalf of his employers, all the facts and circumstances of the case should be taken into consideration. The authority to make such a contract need not be express and special; it may be inferred from circumstances, and the objects of the parties.

No particular form is required for a mandate. For certain purposes it must be express and special; (C. C. 2966;) for others, it may be verbal and general. Ibid. 2961. It may vest an indefinite power, to do whatever may conduce to the interest of the principal. Ib. 2964. And when powers are granted to a person

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exercising a profession, or performing certain functions, the authority is to be inferred from the functions which the mandatary exercises. Ibid. 2969.

The contract of mandate may be tacit as well as express; and the acts of the principal must be fairly and liberally construed towards those who contract with the agent, as well as towards the agent.

Where the law requires a contract to be in writing, the power to execute it must be in writing also; but where this is not required, the power may be in the simplest form, and the intention of the parties may be gathered, as much from their acts, as from their agreements.

A mandate given in writing, in express terms, cannot be enlarged by parol evidence; but, as a general rule, where authority is given by informal instruments and confers general powers, they should be construed with more liberality than more formal and deliberate instruments. The authority should also be construed, as to its nature and extent, according to the terms used and the objects to be accomplished.

In an action on a contract alleged to have been executed by an agent of the defendants, the latter cannot object to the contract's being read in evidence on the ground that the authority of the agent had not been proved; but if no authority be afterwards shown, or none can be properly inferred from the evidence, the contract will be of no avail.

The return of a sheriff showing the manner in which interrogatories propounded to a witness were served on the opposite party, may be amended on the trial of the case. *Per Curiam*. A sheriff should be permitted to amend his return so as to make it conform to the fact, whenever it is called in question. It is not too late on the trial of the case.

An agent by whom a contract has been executed, and who has been released by the plaintiff from any liability to him, may be examined as a witness in an action on the contract, to prove the extent of his powers.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Perin*, for the appellant.

F. B. Conrad, for the defendants.

GARLAND, J. The plaintiff alleges, that he entered into a contract with one Simon Cameron, a duly authorized agent of the bank, by which he bound and obligated himself to extract and clear all the trees and stumps that were visible, of a foot or more in diameter, on the line of the New Orleans canal, and to remove them beyond the limits of the road on each side; in consideration of which, the bank agreed to pay three dollars for each tree or stump extracted. The petitioner further states, that for the purpose of carrying said contract into effect, he expended a large sum of money in preparing his machines and implements for pulling up said trees and stumps, and incurred heavy expenses in

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employing laborers and assistants, and actually commenced the execution of his contract, when the defendants, without cause, violated their agreement, and prohibited him from proceeding with his work, without giving him notice, and actually made one or more contracts with other persons, to do all the work on the said canal, whereby he suffered damage to the amount of ten thousand dollars. It is further alleged, that the petitioner sustained damages to the amount of \$300, in consequence of the agents and workmen in the service of the bank having, after the contract was made with him, cut down a number of trees on the line of the canal, whereby he was much impeded and hindered in his work and operations; and a further sum of six hundred and fifteen dollars and six cents is claimed, for trees and stumps actually pulled up and removed, and for work and labor done and executed for the defendants, making altogether a sum of \$10,915 06. The answer is a general denial of all the allegations.

The contract alleged to have been violated is annexed to the petition, and stipulates, that the plaintiff is to extract and clear away all the trees and stumps that are visible, of one foot or more in diameter, on the line of the canal from Lake Pontchartrain to the city of New Orleans, to the satisfaction of the principal engineer of the company, "for which Simon Cameron, on the part of the New Orleans Canal and Banking Company, as their agent, agrees to pay the said Miller, for each tree or stump so removed, the sum of three dollars." The other parts of the contract it is not necessary now to notice.

The case was tried by a jury, who, under a charge from the judge, that Cameron had no authority to enter into this contract and bind the bank, found a verdict for the defendants, refusing to pay the plaintiff any thing for the trees he actually pulled up and removed. From the judgment given on this verdict, the plaintiff has appealed.

As the case is now before us, it is only necessary to notice the bills of exceptions taken to the charge of the judge, and those relating to the admission or rejection of evidence offered on the trial.

The judge told the jury, in the first place, that the defendants

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relied upon the want of authority, or power, in Cameron to bind them by such a contract. His capacity as superintendent of the works, he said, was acknowledged on all hands, but his appointment as such by the bank did not constitute him "such an agent as by law is authorized to bind the bank in such a contract as the one sued upon." He further told the jurors, that, "in order to enter into a contract like the one sued upon, and to make it binding upon the bank, it was requisite that Cameron should have had from the bank an express and special power to do so; or, in default of such express and special power, that a ratification must be shown, clear, evident, and leaving no doubt as to its object and extent;" and further, that "the ratification must have all the requisites which would have been necessary to grant the power originally." These positions of the judge below were enforced by further remarks to the jury, and to them the plaintiff objects.

To test the accuracy of this charge, it is necessary, that the facts in relation to Cameron's appointment, duties and powers should be stated, and some other matters connected with the construction of the canal. In the spring of the year 1831, the board of directors resolved, "that a committee of three members be appointed to obtain and report to the board all necessary information as to the contemplated canal, particularly as to the quantity and value of the land that may be necessary to be purchased, and generally to obtain such information on this subject as may be useful." This committee was afterwards called the "Canal Committee," and various subjects were referred to it, but no general powers were given other than those mentioned. It continued in existence for a number of years, and perhaps yet exists. In the autumn of the year aforesaid, the bank entered into a contract with Messrs. McCord & Cameron to excavate and complete the canal and other works for a stipulated sum. They commenced the work in conformity with their contract, and the plans of the engineer of the company, but in a short time it was found they could not comply with their agreement, and, in the early part of December, 1831, it was by consent annulled, and, on the 10th of that month, the canal committee was "authorized to employ Simon Cameron in the capacity of superintendent, and to allow him such compensation as shall appear reasonable."

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No specification of powers was made; and under this authority Cameron proceeded to have the work on the canal executed, according to the plans submitted by the engineer, at the expense of the bank. Every week, as appears from the books of the bank, funds were placed, subject to his order, by the board of directors, sometimes on the recommendation of the canal committee, and sometimes without it. He disbursed them and rendered his accounts to the committee, by whom they were reported to the bank. He superintended and directed the whole work, except as to plans, surveys, &c. He made various contracts with individuals and companies, in relation to excavating the canal, purchasing materials and other things. A number of these contracts are in the record, and in all of them he states himself to be the agent and superintendent of the company. The defendants, or their committee, knew that these contracts were made; they discharged them, and required them to be filed as vouchers, in support of his accounts. The contract with the plaintiff was made on the 10th January, 1832. It is not positively proved that the superintendent ever reported it specially to the committee, or to the board of directors; nor does it appear that he ever made a report of any other contract, until it was to be used in settling his accounts. No payment ever having been made on account of this, it does not appear that it was immediately filed. Blank printed forms were made by the agents of the bank, and given to Cameron to facilitate him in making his contracts; but the one in question was not of that kind, as it contains stipulations not in the others, and relates to a different matter. Cameron, in his deposition, says, that he had full authority to make the contract with the plaintiff, and that the bank directors and committee knew all about it; and this statement is supported by the fact, of the operations of the plaintiff being notorious in the city, and considered so extraordinary as to excite much curiosity, he having a machine in operation that enabled him to pull up large trees by the roots and remove them out of the way. The engineer of the company and the assistants knew that the plaintiff was at work, and the practicability of his schemes was often discussed. In the month of February, 1832, some weeks after the plaintiff had commenced his work, the defendants, without giving him notice, or com-

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plaining of his operations, made a contract with a company of individuals, to make the canal, and discharged him; and they now defend themselves on the ground of a want of authority in Cameron to make the contract.

With the foregoing facts before him, the judge charged the jury as before stated. In telling the jury his own conclusions, as drawn from the law and evidence of the case, as the judge seems to have done, we think he erred. Such an expression of opinion was calculated to have an undue weight with the jury, and ought not to have been thrown into the scale to operate against the plaintiff. That the mere appointment of Cameron as a superintendent, did not constitute him such an agent as by law authorized him to enter into this contract, is probably true; but that, we think, is a restricted view of the case. All the objects and circumstances should be taken into consideration. Here was a corporation engaged in an expensive work, for its own profit and the public benefit. The managers of it were probably engaged in active mercantile operations, and not much acquainted with what was necessary to effect their purposes, beyond the supply of the means; and it was indispensable to have some person engaged to superintend the work and apply the funds appropriated, who possessed information, experience, fidelity and energy. These qualities, it is probable, the bank directors supposed were combined in Cameron, and they therefore agreed to pay him a salary of ten thousand dollars per annum, which induces the belief that he was to be considered as something more than a mere superintendent or overseer, appointed to see that the work ordered was executed. It is more than probable that the parties intended, that he who was to execute the work, was to provide or employ the means to complete it, and that ample powers were conferred on the agent. We think the judge should have told the jury to look to all the facts and circumstances of the case, and then say whether or not Cameron had authority to do all that was necessary to effect what he was specially charged to execute. He should have said, that there is no particular form of mandate; that for certain purposes it must be express and special. Civil Code, art. 2966. That for other purposes, it may be verbal and general. Ib. art. 2961. It may vest

an indefinite power, to do whatever may be conducive to the interest of the principal. Art. 2964. And when powers are granted to persons exercising a profession, or performing certain functions, the authority is to be inferred from the functions which the mandatary exercises. Art. 2969. The contract of mandate may be tacit as well as express; and the acts of the principal are to be fairly and liberally construed towards those who contract with the agent, (7 Mart. N. S. 143; 11 La. 288,) and also towards the agent. Whenever the law requires a contract to be in writing, the power to execute it must be in writing also; but when this is not absolutely necessary, the power may be given in the simplest form, and the intention of the parties be gathered as much from their acts as from their agreements. When the power is given in writing in express terms, it cannot be enlarged by parol evidence. Story on Agency, p. 75, § 79. But it is a general rule, where authority is given by informal instruments and confers general powers, that they are to be construed with more liberality than more formal and deliberate instruments. Ibid. p. 77, § 82. The authority must also be construed as to its nature and extent, according to the force of the terms used, and the objects to be accomplished. Ib. § 83. In this case, the contract might have been by parol and still obligatory, and we do not think the authority to make it must have been express and special, but that it may be inferred from the circumstances and objects the parties had in contemplation.

We proceed now to notice several bills of exceptions in the record. The first is to the opinion of the judge admitting the contract sued on to be read as evidence, before the authority of Cameron to make it was proved. The objection was, we think, properly overruled. The plaintiff had a right to have his contract with the alleged agent of the defendants, laid before the jury; but if an authority to make it was not afterwards shown, or properly inferred from the testimony, it would be of no avail. It was a link in the chain of evidence properly received, but of no force in itself, until connected with something else.

The next bill is to the opinion of the court, permitting the sheriff to amend his return as to the service of the interrogatories on the defendants. The plaintiff wished to take the depo-

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sition of Cameron, and had his interrogatories served on the defendants in the manner directed by law ; but the sheriff made a mistake in describing the person on whom they were served. The defendants' counsel objected to the deposition being read on this ground, when the counsel for the plaintiff moved, that the sheriff have leave to amend his return, to which objection was made, that it was too late, more than four months having elapsed, and the cause being then on trial. We think the judge did not err in permitting this amendment. It is a well settled principle, that a sheriff should be permitted to amend his return so as to make it conform to the fact, whenever it is called in question ; and it is not too late on the trial of the case.

During the trial, the plaintiff offered in evidence the deposition of Simon Cameron, to prove what powers were confided to him by the defendants, and that he had made other contracts which the directors of the bank were informed of, and had approved and discharged. To this, the counsel of the defendants objected, on the ground that Cameron could not be a witness to prove the extent of his agency, although released by the plaintiff from any liability to him. The court sustained the objection and rejected the deposition, to which the plaintiff excepted. We think the court erred. Many cases have been decided by this court, recognizing the competency of agents to testify in cases in which their principals were parties, and the acts of the agent involved. 13 La. 216. 9 La. 52, &c. The deposition ought to have been admitted, and the weight it was entitled to, left to the jury. 2 Starkie, 767 to 769.

In consequence of the erroneous charge of the judge to the jury, and of their finding a verdict in obedience to it, we must reverse the judgment and remand the cause for a new trial, it not being in our power to pass upon the case as now presented to us.

It is ordered and decreed, that the judgment of the Parish Court be annulled and reversed, and the cause remanded for a new trial, with instructions to the judge to admit the deposition of Cameron in evidence, unless some other objection exists to its admissibility than is stated in the bills of exceptions decided on ; and in his charge to the jury to conform to the principles of law herein stated, and in other respects to proceed according to law ; the defendants paying the costs of the appeal.

Brode v. The Firemen's Insurance Company of New Orleans.

HENRY BRODE v. THE FIREMEN'S INSURANCE COMPANY OF
NEW ORLEANS.

A garnishee cannot interfere, as to the merits of the case, between the plaintiff and defendant.

No express authority in the charter of a corporation is necessary to authorize it to make a promissory note, in the course of their legitimate business.

A creditor who has obtained judgment against a corporation and issued execution thereon, may propound interrogatories to any stockholder, under the 13th section of the stat. of 20 March, 1839, to ascertain whether the whole amount of his stock-subscription has been paid in; and if any portion be unpaid, it may be seized by the creditor in satisfaction, as far as it will go, of his judgment. The fact of other stockholders having paid less than their proportion, is a matter to be settled between the stockholders themselves.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Loundes*, for the plaintiff, cited stat. 20 March, 1839. *Cucullu et al. v. The Union Insurance Company*, 2 Robinson, 571. *Kennicott and Frazer*, for the appellants.

MORPHY, J. The plaintiff having obtained a judgment against the Firemen's Insurance Company of New Orleans, as drawers of a promissory note for \$741 64, to his order, sued out a writ of *fieri facias*, which being returned *nulla bona*, an *alias* writ issued and interrogatories were propounded to some of the stockholders of the company, under the 13th section of the law of 1839, to ascertain the amounts respectively due by them to the defendants, on their subscription to the capital stock. To these interrogatories Taylor & Hadden answered, that, in January, 1843, they became stockholders for thirty shares in the Firemen's Insurance Company, which they still own, and on which they had paid \$1164 98, being thirty-eight dollars, and sixteen cents on each share of fifty dollars, which was \$319 98 more than had been called in, and more than had been paid by the other stockholders, and that, consequently, the company owed them this amount. On these answers, the garnishees, Taylor & Hadden, were decreed to pay the balance of their subscription, to wit, \$11 84 per share, making \$355 20. They have appealed.

Their counsel has urged, that the defendants had no right under their charter, to make and issue promissory notes. Even if

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this were true, it would furnish to the appellants no just ground of defence against the claim of the plaintiff, as it has now ripened into a judgment from which no appeal has been taken. They have moreover, no right to interfere with the merits of this case, as between the plaintiff and the defendants; but if it were competent for them to raise this point, we see nothing in the charter of the company to sustain it. When, in the course of their insurance business, the company have incurred losses, and have not the cash on hand to meet it, why should they not give a written acknowledgment of their liability, and promise to pay the debt at some future period? It is believed to be the way in which most of the insurance offices settle their losses, for the payment of which their policies generally stipulate some delay. The note given to the plaintiff, being a contract made by the defendants in the course of their legitimate business, no express authority in their charter was necessary to enable them to make it. Angel & Ames, 145.

The appellants further urge, that the plaintiff has mistaken his remedy, and that the directors of the company ought to have been compelled, by a writ of *mandamus*, to enforce payment from the stockholders of a sum necessary to pay the debts of the corporation. This ground of defence has been considered and disposed of in the case of *Cucullu and others v. The Union Insurance Company*, 2 Robinson, 571. The appellants having paid on the amount of their stock only thirty-eight dollars and sixteen cents per share, are liable for the balance. If other stockholders have paid less than they have, it is a matter to be settled between themselves; but as regards third persons, each stockholder is liable for the full amount of his subscription, which, being due to the company, can be seized by its creditors.

Judgment affirmed.

JAMES KIRKMAN and others v. WILLIAM BOWMAN, Owner of the Steamer Paragon.

A bill of lading is only *prima facie* evidence of the truth of its contents, as between the parties.

The second clerk of a steamer, may execute on behalf of the boat, a bill of lading in the ordinary way, and his receipt for merchandize delivered on board, will be binding; but to make a special contract—as to bind the boat for articles not delivered on board, his authority must be shown.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

This was an action to recover from the defendant as owner of the steamer Paragon, \$28,000, the value of 850 bales of cotton, alleged to have been received by defendant to be delivered to plaintiffs, as will appear from a bill of lading annexed to the petition. The defendant answered by a general denial, averring that he had delivered to plaintiffs all the cotton he ever contracted to deliver to them; and by claiming \$10,000 for freight of cotton, and for work and labor done, &c. There was a judgment below, in favor of the defendant, against the plaintiffs, for \$3720 73, with interest, from which the latter appealed.

P. Anderson, for the appellants. The bill of lading must determine the rights and duties of the parties. It is a contract in writing, and its terms cannot be varied by parol proof. There is no ambiguity in it, and on *all questions as to its meaning*, it must speak for itself. 1 H. Black. 359. 8 Mart. 206. This bill of lading, however, like all other contracts, may be affected by parol, when, by *reason of fraud or mistake*, it varies from the *agreement* on which it was founded; but in such a case, the parol proof is not to ascertain the *meaning of the contract*, but to ascertain the meaning of the *agreement*; and then, if it be proved that the non-conformity of the contract with the agreement arose *from fraud or mistake*, the court will reform the contract, and enforce the rights of the parties according to the reformed contract.

It must be obvious, that such parol proof cannot be admitted under the general issue, but must be the subject of a special answer. At common law, the contract would prevail at law, and the power to reform it belonged to a court of chancery. Giving every latitude to a more loose or liberal practice, it seems to be going too far to admit a defence not disclosed by the answer, but which the answer obviously tends to conceal. 8 Mart. 206.

The judge below seems to think, that the parol evidence in this

case was admissible, because it was offered to *explain the meaning* of the bill of lading; and he thought it might be done as in the *case of a receipt*, and particularly between the parties to it. Now the case from Blackstone shows the bill of lading to be a contract; and the case in 8 Martin shows, that parol evidence cannot be admitted to explain it. If it were in the nature of a receipt, it could not be varied by parol. See 3 Mart. N. S. 454. 7 Ibid. N. S. 206. This error of the judge no doubt led him to disregard the exception, that parol proof ought not to be permitted under the general issue.

What then was the contract? It was an engagement on the part of the defendant, to carry a quantity of cotton from Tusculumbia to New Orleans, and to deliver it to the plaintiffs for the sum of \$2 50 per bale. We have then only to inquire whether he has delivered it according to the contract. Confessedly he has not. One hundred and twenty bales are missing, and have never been delivered.

The defendants seek to protect themselves by the facts set forth in the depositions; and say, that the *contract* ought to be reformed, because, by the agreement, they were not to be liable for any loss occasioned by transporting the cotton to Waterloo, a part of the distance, and that their duties, as common carriers, did not commence until the cotton reached that place. Now it is obvious, that this asserts an *agreement* quite different from the *contract*, but independent of its inadmissibility for the reasons above mentioned, two questions are presented for consideration.

First, whether there was any *fraud or mistake*, by reason of which the contract was made to speak a language different from what it ought to have spoken. Such fraud or mistake must exist, or the contract cannot be reformed. "Where each party," says Judge Story, "is equally innocent, and there is no concealment of facts, and no surprise or imposition, the mistake, whether mutual or unilateral, lays no foundation for equitable interference. It is strictly *damnum absque injuria*."

In the case of *Hunt v. Rousmanier*, (8 Wheat. 174,) a debtor had agreed with his creditor to give him a security for his debt on a ship belonging to him; and they agreed, at the same time, as to the mode of doing it, which was by granting a power of attorney to sell the ship and apply the proceeds to the payment of the debt, if it should be unpaid at the expiration of the term of credit. The debtor died, and a bill was filed by this creditor to have his contract reformed, and praying for a decree declaring him to have a mortgage lien on the ship, which was clearly the intention of his debtor to grant him. The court refused to entertain the bill, because there was no mistake or fraud in the taking of the power of attorney. It seems, therefore, unless the defen-

dants in this case can show that they signed the bill of lading from some misapprehension, they ought not to be permitted to set up a parol agreement.

But this view of the case need not be pressed, as it is clear that the second matter suggested for consideration, viz., whether, in point of fact, there was an agreement differing from the contract, is clearly with the plaintiffs. "In all such cases,"—that is, in cases of fraud and mistake, says Judge Story, "if the mistake is *clearly made out*, by proof *entirely satisfactory*, equity will reform the contract, so as to make it conformable to the intent of the parties; but if the proofs are *doubtful* and *unsatisfactory*, and the mistake is not *made entirely plain*, equity will withhold relief, on the ground that the writing ought to be treated as the best evidence of their intent." 1 Eq. Jur. 169.

When the cotton was laden on board of the flats at Tuscumbia, it was at the risk of *some* person as a common carrier. Who was that person? The boats on which it was laden, belonged to Bowman, who had purchased them of Reese, Ferrie & Banks. The price agreed to be paid for transportation, was the usual price for transporting goods from Tuscumbia to New Orleans. Does the fact then, that Bowman agreed to pay a portion of the freight thus reserved by the bill of lading, to Reese, Ferrie & Banks, for taking the cotton to Waterloo, in any way diminish his liability to the owners of the cotton? This question arose in the case of *Hyde v. The Trent Navigation Company*, 5 Durnford & East, 201. In this case the bill of lading was from Gainsborough to Manchester. The cotton was taken on board defendants' barge on the Trent, and was safely landed and warehoused in the Duke of Bridgewater's warehouse, in Manchester, where it was destroyed by fire. The question was, whether the risk of the carrier continued until the cotton was delivered to the plaintiff, who resided in the town. The following facts were proved: It was the practice of some persons to send their own carts to the warehouse, but the *general usage* was for the defendants to furnish carts to carry the cotton from the warehouse to the house of the owner. *But the defendants had discontinued the business of carting, and all the profits of that portion of the business was given over to one Hubbard, which fact was known to the plaintiff.* The court declared the defendants to be liable, *because they had made a charge for conveying it to the owner*; and, although it was known to the plaintiff that this charge was paid over to another, for whose use they collected it, yet the defendants' liability was not thereby diminished.

"In this case," says Lord Kenyon, "there is one peculiar circumstance that makes it unnecessary to decide the general question, and that is the *charge made* by the defendants for the cart-

age at Manchester."—"I am glad," says Ashhurst, J. "to find one circumstance which puts the case out of all doubt, namely, that one of the bills contains a charge for cartage, which is decisive to show, that the liability continued until the goods were delivered."

If then, the fact of charging cartage, was decisive of the question of the defendants' liability, for the carriage of the goods from the warehouse to the plaintiff's residence, is not the fact that Bowman charged the owners of the cotton for transportation from Tuscumbia to Waterloo, equally decisive of his liability to them. And if he paid the whole, or a part of it, to Reese, Ferrie & Banks, that can no more change his liability than did the fact of the cartage being paid over to Hubbard, a fact well known to the plaintiff.

That Bowman did charge for transportation from Tuscumbia to Waterloo is apparent, not from the bills of lading alone. He settled with the consignees at \$2 50 per bale. Now it is in evidence, that this is the price of transportation from Tuscumbia. The price from Waterloo was two dollars. The fifty cents was made up of twenty-five cents warehouse charges, which was not properly storage, but a premium paid by the boats for a preference given them over other boats; and of twenty-five cents for lighterage to Waterloo. Both these sums, it will be observed, are charged to the owners in the bill of lading, and collected of the consignees.

Reese, Ferrie & Banks did not, in lightering the cotton, act as agents for the owners, but as agents for the steamboat; and if they have not discharged their duty, they are responsible to their employers.

But the defendant's counsel rely on the want of capacity of the consignees, to sue for non-delivery. This is not law—the case relied on does not bear them out. Abbott on Shipping, 391. The case was on an assignment of the bill of lading by the consignor to one *as his agent*. It was not a consignment to a factor for sale. Such a consignee has a special property by the delivery to the carrier. The bill of lading itself, is evidence of property in the consignee. 2 Campb. 38. 2 T. R. 71.

The defendant's counsel refer to Abbott, 216. That writer says, that if the person to whom the consignor, *on a bill of lading to deliver to the consignee or his assigns*, directs the delivery to be made to an agent, *having no property in the goods*, such agent cannot, in his own name, maintain a suit for non-delivery. He cites the case of *Waring v. Cox*. It will be seen, by looking into the case, (4 East, 211,) that the consignor sent the bill of lading to an agent to enable him to receive the goods for his use, in case the consignee should fail. He sent an unendorsed bill of lading to

the consignee. Now the court held, that the *shipping of the goods* to the consignee vested the property, subject only to be divested by the right to stop *in transitu*, and that the consignee having got possession, that right was destroyed, although the carrier ought not to have delivered the goods. The court intimate a doubt, but do not decide, that the agent to whom the bill of lading was sent, could not sue in his own name.

Elwyn, on the same side.

R. H. Chinn, for the defendants. The testimony of witnesses was admissible, between the parties to a bill of lading, to explain their intentions. 17 Mass. 257. 14 Johns. 210. 20 Johns. 338. 3 Serg. & Rawle, 309. 1 Haywood, 70. 3 Cranch, 311. 3 Starkie, 1014, 1044, 1729, 1730. 2 Mart. N. S. 122, 333. 8 Mart. N. S. 542. A mere naked consignment gives no right to the consignee to maintain this suit. Abbott, 216.

Vason and *P. W. Farrar*, on the same side.

BULLARD, J. The only question which this voluminous record presents for our consideration is, whether one of the flat-boat loads of cotton, which the steamboat *Paragon* engaged to tow down the river from Waterloo, on the Tennessee river, was at the risk of the boat in its transit over the Colbert shoals, and until delivered and received at Waterloo, about thirty miles below Tusculumbia.

It is necessary to premise, that it was in contemplation to send down by the steamboat *Paragon*, besides some bales on board, four flat-boats loaded with cotton, which were to be sent over the shoals and taken in tow at Waterloo, the cotton being at Tusculumbia. The pilot of the boat was dispatched up the river, and brought down two of the flats. Another, which is the one in controversy, was sent down by the steamboat *Stacker*, arrived safe at Waterloo, but was sunk some hours afterwards, without ever having been delivered to the boat, or even notice given to the captain or owners that it was one of the flats intended for the *Paragon*. The second clerk of the *Paragon*, who had been left at Tusculumbia, it would appear, for the purpose of checking off or taking a note of the bales laden on board the flats, signed a bill of lading at Tusculumbia while the boat was at Waterloo, in the following form: "Shipped in good order and condition, by Reese, Ferrie & Banks, for account and risk of owners, on board flat-boats to be towed by steamboat *Paragon*, whereof Ragland is

master, now lying in the Tennessee river, and bound for New Orleans." The freight was at the rate of \$2 75 per bale.

The court, in our opinion, did not err in letting in all the parol evidence relating to the transaction, though tending to contradict the bill of lading, which the court correctly regarded as only *prima facie* evidence of the truth of its contents between the parties; more especially in this case, where, even admitting the authority of the second clerk to sign a bill of lading for articles actually delivered on board, it does not follow that he had authority to make a special contract, and to dispense with the delivery of the property to be conveyed. Again; the bill of lading may be strictly true, that the cotton had been put on board the flat to be towed by the Paragon, and yet the liability of the owners of the Paragon not shown, without proof of a special engagement, that the cotton thus laden should be at the risk of the Paragon from Tuscumbia to New Orleans, while under the charge of persons not employed by them, and unknown to them.

The evidence thus let in to show what was the agreement between Bowman, the owner of the steamer Paragon, and Reese, Ferrie & Banks, the shipping agents of the planters who owned the cotton, shows pretty clearly in relation to the flat-boat which was sunk, that it was to have been delivered by Reese, one of the partners at Waterloo. He testifies himself that he agreed to send the flats, when loaded, to Waterloo to the steamer Paragon. It is true, he insists that the flat was at the risk of the defendant. There is a circumstance which makes against the idea that the load of cotton was to be at the risk of the boat from Tuscumbia. It is, that Bowman was to purchase the boat itself, if it was of a particular quality. It does not appear that that contract was ever completed, for Bowman never saw the boat before she was sunk. The persons charged by Reese to take her over the shoals, never gave him notice that it was the one destined for the Paragon. The captain of the boat is far from proving that Bowman agreed to take the flats on his responsibility at Tuscumbia. He states, that Reese, Ferrie & Banks received lighterage on the two last flats. Two had been taken down by the pilot of the Paragon.

Three witnesses swear positively, that the bargain between Bowman and Reese was, that the flats were not to be at the risk

of the boat; that they were to be sent down to Waterloo by the shippers, and received there to be towed. The second clerk was left behind for the purpose of taking an account of the cotton, as it was laden on board the flats. It appears also, that although the lighterage from Tuscumbia to Waterloo was included in the bill of lading, yet it was only advanced by the boat; that it was in fact received by Reese, Ferrie & Banks. It constituted a charge upon the cotton, and not a part of the freight.

We concur fully with the court below in the opinion, that no custom has been shown in relation to the trade of those places, which should make owners of boats liable for the risk of conveying cotton over the shoals, without their consent.

The argument of the counsel for the plaintiff would have great weight, if the bill of lading signed by the second clerk of the boat were conclusive upon the defendants. It would show a special agreement in conformity to the alleged usage of the trade, and a charge of freight from Tuscumbia. But it is not pretended that any such contract was made with the clerk, nor indeed any at all, except what results from the signature of the bill of lading. He might well have authority to execute a bill of lading in the ordinary way, and his receipt for merchandize on board would bind the boat; but his authority must be shown to make a special contract. In this we think the plaintiffs have failed.

In the case cited from 5 Durnford & East, no question arose as to the authority of the agents who had given the receipt for the goods to be delivered in Manchester, and which included the charge for cartage at Manchester, from the Duke of Bridgewater's warehouses into the city. The goods were left in the warehouses (which were destroyed,) by the carriers who had engaged to convey them into town, having received the cartage. This last was regarded by Lord Kenyon as the decisive fact in the case; and so it would be in this case, if the liability of the parties were to be measured by the bill of lading alone.

There is but one matter in relation to this case, in which we do not concur in the opinion expressed by our learned brother of the Commercial Court, to wit, that equally strong reasons could be given for deciding the other way.

Judgment affirmed.

ROLAND G. HAZARD v. BURWELL BOYKIN.

An impeachment of the certificate and discharge of a bankrupt under the act of Congress of 19 August, 1841, as having been "obtained in error and fraud, the said bankrupt having fraudulently made payments, given securities, conveyances and transfers of his property, and made agreements in contemplation of bankruptcy, and for the purpose of giving certain creditors, endorsers and sureties, preference and priority over his general creditors, and over the plaintiff," is too vague and indefinite. It should have specified the particular error or fraud complained of.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Hamner*, for the appellant. The case must be remanded for further proceedings, judgment having been rendered without the cause having been set down for trial, either regularly, or by consent. Code of Pract. arts. 533, 535, 463. Acts of 1841, p. 17, s. 16, 6 Mart. N. S. 635. 3 Robinson, 370. Judgment should have been rendered only on the exception. Code of Pract. arts. 344, 536, 606, 532, 419, 491, 492, 494, 495. No judgment can be pronounced by this court on the merits; to do so, would be to assume original jurisdiction. Code of Pract. art. 874. 6 Mart. N. S. 635. 19 La. 210. The judgment on the exception itself was wrong. The only legal judgment which could have been rendered would have been in the alternative, directing the plaintiff to amend his impeachment, or, in case of his failure to do so, ordering it to be dismissed. The general principle is, that amendments should be allowed whenever the ends of justice will be promoted thereby. See 3 Robinson, 126.

Elmore and *W. W. King*, for the defendant.

MARTIN, J. The defendant resisted the plaintiff's claim, on the ground that since it accrued, the defendant has sought for and obtained a discharge from all his debts, from the Court of the United States for the district of Alabama, which discharge is pleaded in bar to the present suit.

The plaintiff impeaches the certificate and discharge of the defendant; and avers, that they were obtained in error and fraud, he having fraudulently made payments, given securities, conveyances and transfers of his property, and made agreements, in con-

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templation of bankruptcy, and for the purpose of giving certain creditors, endorsers and sureties, preference and priority over his general creditors, and over the plaintiff.

The defendant excepted to this impeachment as too vague, indefinite, and general, not specifying what particular error or fraud is complained of. There is also an exception to the jurisdiction of the court.

The court sustained the exception of the defendant to the plaintiff's impeachment of his certificate and discharge; did not act on the plea to its jurisdiction; and gave judgment absolutely for the defendant. In our opinion, the judge erred. We admit the impeachment was too vague, general, and indefinite, not affording the defendant any knowledge of any particular fact, as to which it was necessary he should prepare himself with evidence in order to disprove any charge which the plaintiff might attempt to substantiate; but the opportunity ought to be reserved to the plaintiff to establish his pretensions in another suit.

It is, therefore, ordered, that the judgment be annulled and reversed, and that ours be for the defendant, as in case of nonsuit; the plaintiff paying the costs below, and the defendant those of the appeal.

SAME CASE—ON A RE-HEARING.

Defendant having pleaded his discharge as a bankrupt under the act of 1841, plaintiff impeached it, and defendant excepted to the impeachment for vagueness and insufficiency. On the trial of the exception the court sustained it, and thereupon gave judgment at once in favor of defendant upon the merits. *Held*, that the case not being before the court on its merits, but only on the exception, no judgment could be legally rendered but upon the latter leaving the case to be afterwards tried on the merits, when regularly set down; (C. P. 463, 533, 535. Stat. 10 February, 1841, s. 16;) that the main issue was, whether the certificate was a bar to the action; that plaintiff was entitled to a hearing thereon; and that the case should be remanded for that purpose.

Hamner, for the appellant, urged that the case should be remanded for further proceedings below.

Elmore and *W. W. King*, for the defendant, contended, that the judgment of the court below was correct. The plaintiff having admitted the existence of the discharge by impeaching it, when the impeachment was set aside, the whole case was before the court. There was no occasion to defer a decision—to do so could have been of no advantage to either party.

MORPHY, J. The defendant having pleaded in bar to the plaintiff's claim a certificate of discharge, delivered to him by the District Court of the United States for the Southern District of Alabama, the plaintiff impeached his certificate as obtained through fraud. The defendant excepted to the impeachment as too vague and indefinite in its terms to enable him to know what were the charges against which he was to defend himself, and prayed that the impeachment be dismissed. Upon the trial of this exception, the judge sustained it, and immediately gave judgment absolutely in favor of the defendant upon the merits of the case. The plaintiff appealed.

The judge, in our opinion, erred. The case was not before the court on its merits, but only on the exception. No other judgment could be rendered but one granting or denying the defendant's prayer in his exception for the dismissal of the impeachment, and leaving the suit to be tried on its merits, when regularly set down for trial. Code of Pract. arts. 463, 533, 535. Acts of 1841, p. 17, sec. 16. The main issue made up between the parties was, whether the defendant's certificate was a bar to the plaintiff's action. On this issue, however free from doubt it might have appeared to the court, the plaintiff was entitled to a hearing, and to the delays allowed to him by law for preparing his case for trial. When this case was before us, we reversed the judgment below, and rendered one for defendant as in case of nonsuit. We have reconsidered the position in which the parties stood under the pleadings, and now think, that the case should be remanded for further proceedings, leaving the plaintiff to pursue such course as he might have thought proper to adopt, had no judgment been rendered on the merits.

It is, therefore, ordered that the judgment of the Commercial Court be reversed, except so far as it sustains the exception made to the impeachment filed by the plaintiff; and it is further order-

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ed that the case be remanded to be proceeded in according to law, the appellee paying the costs of this appeal.

JOHN D. FINK, Executor of the last will of Sarah Baum, deceased, v. WILLIAM H. MARTIN.

Where no sale could be made of a slave seized under execution, for want of any bid of sufficient amount to satisfy a special mortgage entitled to priority over the plaintiff's judgment, and the *fi. fa.* is returned into court, the slave cannot be detained by the sheriff. C. P. 684. Nor will the fact of a judgment having been obtained from a court of original jurisdiction, annulling the mortgage as simulated and fraudulent, authorize the detention of the slave, where the defendant has taken a suspensive appeal. If the plaintiff was apprehensive that the slave, if returned to the debtor, might be concealed or taken out of the state, he might have caused him to be sequestered, notwithstanding the suspensive appeal.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

H. D. Ogden and Hoffman, for the plaintiffs.

McHenry, for the appellant.

MORPHY, J. On the 28th of December, 1842, an execution was issued in this case, under which, among other property, the slave David, a valuable mechanic, belonging to the defendant was seized. He was not offered for sale until April following, when, as appears from the return of the sheriff, no adjudication could take place for want of bids to an amount sufficient to pay the mortgages having priority over that of the plaintiff. A rule on the latter and the sheriff, was then taken by the defendant, calling upon them to show cause why the slave David should not be returned to him, as no sale could be made, and as, by retaining said slave in jail, his services were lost to his master, who was entitled to them, and as his whole value would be absorbed by the charges and expenses for keeping him, &c. The answer to this rule represents, that the special mortgage which prevents the sale of the slave David is fraudulent and simulated, and has been so decreed by the District Court, in a suit of the plaintiff against

Martin and J. B. Ross, now pending on an appeal from that judgment. The judge of the Court of Probates ordered the rule to be discharged, whereupon the defendant appealed.

The record shows, that the only *special* mortgage on the slave David, anterior to the recorded judgment of the plaintiff, is one which was granted by the defendant to J. B. Ross, on the 4th of May, 1842, on this slave, and on other property. Shortly after making his seizure, the plaintiff instituted an action in the District Court to have this mortgage avoided as fraudulent and simulated. He obtained a judgment by default, which was confirmed, but from which a suspensive appeal has been taken, which is now pending before this court. It further appears, that the writ of *feri facias*, under which the seizure had been made, was returned into the court below, on the 20th of April, 1843. The question is, whether, under these circumstances, the slave David can be detained in jail for an indefinite period of time, his master deprived of his services, and his whole value consumed in jail fees and other charges.

It has been repeatedly decided by this court, that a sheriff who makes a levy before the return day of a writ, may proceed to sell the property seized after it has expired. 3 Mart. N. S. 489. 8 Ib. N. S. 391. 1 Robinson, 540. But this, we apprehend, he can do only when he retains in his hands the writ under which the seizure was made, and which was his authority to proceed to the sale of the property levied upon. When the *feri facias* has been returned into court, as in this case, because no sale could take place under it, we cannot see what right or authority the sheriff can have to withhold the property seized. Article 684 of the Code of Practice, which provides, that no adjudication can take place, if the price offered is not sufficient to discharge the privileges and mortgages existing on the property, and which have a preference over the judgment creditor, says, that the sheriff, in such a case, shall proceed to seize other property of the debtor, if there be any. This article implies, we think, that he is to surrender the property out of which his writ cannot be satisfied. If he is directed to seize other property, he is not at the same time to retain that first seized, which, by reason of prior encumbrances, he cannot sell. It is urged, that as the mortgage in favor

of Ross, which is the only one that can prevent a sale, has been declared simulated by the District Court, this decision, notwithstanding the suspensive appeal taken from it, is presumptive evidence against its fairness and verity, and that the plaintiff would be materially injured by the release of the slave, as it would enable the parties to the fraud to place said slave out of his reach. The judgment of the District Court annulling the mortgage of Ross, may, or may not, be affirmed. Whatever may be the presumption arising from such a judgment, as a suspensive appeal has been taken from it, the mortgage standing on the books of the recorder of mortgages must be regarded and treated as a real and subsisting one, and must prevent the sale of the property as long as it not finally declared to be void. Eighteen months have already passed away since the seizure was made, and many more may, and probably will elapse, before the case is reached and disposed of in this court. Is the defendant, during all this time, to be deprived of the use of his property, and to see its value exhausted in unnecessary costs and expenses? We apprehend not. If the plaintiff entertained any fear that the slave, on being surrendered to his master, would be concealed, or taken out of the State, he might have had him sequestered during the pendency of the suit he brought in the District Court, and the defendant could not have regained possession of his property without giving adequate security. B. & C.'s Digest, pp. 156, and 774. Code of Pract. arts. 279, 280. This remedy the plaintiff has, and can exercise yet, notwithstanding the suspensive appeal taken from the judgment of the District Court, *Williams v. Duer*, 14 La. 537. No writ being in the hands of the sheriff, and no sale being possible if he had one, that officer is without any right, in our opinion, to withhold the defendant's property.

It is, therefore, ordered, that the judgment of the Court of Probates be reversed; that the rule taken by the defendant in this case be made absolute, and that he do recover the possession of the slave David, now in the custody of the sheriff; the appellee paying the costs in both courts.

SUCCESSION OF VALERY JEAN DELASSIZE.

A claim on which suit has been instituted, or a judgment, may be transferred verbally. Such transfers may be proved by witnesses; and where the amount of the claim, or judgment, exceeds five hundred dollars, the transfer may be established by one witness and corroborating circumstances.

The notice to be given to the debtor to render the transfer of a claim or judgment binding upon third persons, is not required to be in any particular form. It is enough that it be such as to inform him of the fact that his former creditor is divested of all his rights to the thing assigned. Such notice may be proved like any other fact, according to the established rules of evidence; and one witness is sufficient, whatever be the value of the claim or judgment transferred.

No law authorizes the substitution of the name of the transferee of a claim in suit for that of the transferor, on the records of the court. In case of such a transfer, it is customary to prosecute the suit to judgment in the name of the plaintiff, but for the benefit of the transferee.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

R. M. Carter, for the appellant, cited *Thomas v. Callihan's Heirs*, 5 Mart. N. S. 180.

D. Seghers, contra, cited the Civil Code, arts. 2612, 3613, 2614, and the Commentaries of Troplong on the corresponding articles 1689, 1690, 1691, of the Code Napoléon. *De la Vente*, vol. 2, p. 453, *et seq.* Nos. 881, 882.

MORPHY, J. A provisional tableau of distribution, or account, was filed by the dative executor of the deceased, wherein it is stated that Wm. Downing claims the amount of a judgment rendered on the 7th of December, 1839, in his favor and against the deceased, for \$1553, but that this claim is resisted on the ground that under a *feri facias* issued from the City Court of Lafayette at the suit of W. R. B. Wills, a judgment creditor of Downing, the sheriff of the parish of Orleans seized and sold to Jean Dufour, all the right, title and interest of W. Downing in and to the said judgment against Delassize, and that, subsequently, the deceased settled with Jean Dufour for said judgment, whereby his debt to Downing was extinguished. To this account James Marlatt made opposition, claiming to be placed on the tableau of distribution as a privileged creditor of the estate for \$1553, being the

amount of a judgment against the deceased, which he alleged was transferred to him by Downing, in May, 1838, and which was duly recorded on the 12th of April, 1840. Marlatt's opposition was dismissed, the judge below being of opinion that assignments and notices of assignments should be in writing in order to bind third persons; and that, even if they could be proved by oral evidence, that adduced in the present case, was insufficient, inasmuch as the claim exceeds \$500. Marlatt has appealed.

We are unacquainted with any law prescribing that assignments, or transfers of debts or incorporeal rights shall be in writing. All contracts which are not expressly required to be reduced to writing, can, we apprehend, be made verbally. In the case of *Hughes v. Harrison et al.*, 2 La. 89, this court held, that parol evidence was admissible to prove the sale and transfer of a note payable to order, without endorsement or written transfer. A debt or a judgment is personal property, the assignment of which can always be proved by witnesses. As to the notice which must be given to the debtor, in order to render an assignment binding on third persons, we have repeatedly said, that no particular form is required, and it is enough if notice of the transfer be given to him so as to bring home to him the knowledge that his former creditor is divested of all his rights to the debt assigned. The fact of such notice may be proved like any other fact in a cause, according to the established rules of evidence. 12 Mart. 702. 1 Ib. N. S. 425. 5 Ib. N. S. 180. 6 Ib. N. S. 296. 17 La. 472.

R. M. Carter testified, that Marlatt had a claim for about \$700 or \$800 against Downing; that at the time, a suit was pending by Downing against Delassize for about \$1200 or \$1500; that to pay or secure the payment of his debt to Marlatt, Downing transferred to the latter the claim against Delassize in his (witness's) presence, and witness gave notice of said transfer to Delassize, and also to the sheriff; that subsequently to said transfer, the judgment against Delassize was sold by the sheriff at the suit of Wills; that witness was attorney for Marlatt, and subsequently took steps for Marlatt, and on behalf of Downing, to recover the claim from Delassize.

Another witness, J. C. David, deposed, that in his presence

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Downing declared, that he had transferred his claim against Delassize to Marlatt. This declaration of Downing, testified to by the second witness, is in our opinion a corroborating circumstance in support of the deposition of the first one, and renders it sufficient to prove the assignment of the debt to Marlatt. More than one witness was not required to prove the fact of notice to the debtor. We do not attach much importance to the circumstance that, after the assignment, the proceedings were continued in the District Court, and motions were made in the Court of Probates, in the name of Downing, as if no transfer had taken place. There is no law authorizing the substitution of an assignee's name to that of the assignor on the records of the court; and it is customary, we believe, when a transfer of this kind takes place during the pendency of a suit, to prosecute the same to judgment in the name of the original and apparent plaintiff, but for the benefit of the assignee. We are satisfied from the testimony, that the judgment obtained against Delassize, in December, 1839, belonged to Marlatt, under the assignment previously made to him by Downing; and that, therefore, the purchaser at the sheriff's sale, made at the instance of Wills, in April, 1835, acquired nothing, when he bought all the right, title and interest of Downing in and to said judgment. The record shows, that this judgment was recorded on the 29th of April, 1840, and that, on the 5th of April, 1841, it was admitted to be subject to a credit of two hundred dollars, on a motion made to obtain an *alias fieri facias* against Delassize from the District Court.

It is, therefore, ordered, that the judgment of the Court of Probates be reversed, and that James Marlatt be placed on the account filed by the dative testamentary executor as a mortgage creditor for \$1353, and his costs of suit in the District Court; and it is further ordered, that the account so amended be approved and homologated. The costs in both courts to be paid by the estate.

THE UNITED STATES v. THE PRESIDENT, DIRECTORS AND
COMPANY OF THE BANK OF THE UNITED STATES.

It was not the object of the English statute of 13th Eliz. ch. 5, to invalidate fair and *bona fide* transactions; nor is every conveyance which has the effect of delaying or hindering creditors, in itself fraudulent. It must be devised "of malice, fraud, covin, collusion or guile," to bring it within the statute.

Conveyances or assignments to one or more creditors for the security or satisfaction of a debt due by the grantor, are, *prima facie*, good, within the stat. of 13th Eliz. ch. 5.

By the laws of Pennsylvania, a debtor, whether insolvent or not, may make either a partial or general assignment of property, either in possession or in action, for the benefit of his creditors, and may prefer one to another.

An assignment of property, real or personal, to trustees for the benefit of the creditors of the assignor, legal and valid by the laws of the State in which it was made, and accompanied by delivery, will be respected in this State. Such contracts must be governed by the law of the place where they were executed. C. C. 10. C. P. 13.

By the laws of Pennsylvania, a corporation is as competent as a natural person to make an assignment for the benefit of creditors, and to give a preference to one or more creditors, even after insolvency.

The statute of Pennsylvania, of the 4th May, 1841, authorized the president, directors and company of the Bank of the United States, to dispense with the inventory and bond and surety required by the statute of 1836, in the case of a partial, as well as in that of a general assignment of its property for the benefit of its creditors. Sa. 19, 20.

The assignments made by the Bank of the United States, for the benefit of certain of its creditors, on the 7th June, and 4th and 6th September, 1841, are valid under the laws of that State, and sufficient to transfer the property of the bank in this State.

It is no objection to the validity of an assignment for the benefit of creditors, under the laws of Pennsylvania, that it has not been expressly accepted by them. Acceptance will be presumed where it is shown that the assignment was for their benefit, and there is no stipulation for a release of the debts, nor any thing calculated to delay the creditors unreasonably.

Delivery of the evidence of a debt is a sufficient delivery of the possession of it. Notice to the debtor is necessary in some cases; but not in transfers of bills of exchange or notes payable to order previous to maturity, nor afterwards, but to prevent the parties bound from acquiring equities against the holder, to which they might be entitled if not notified.

Personal property has no locality, and the law of the owner's domicile will, in all cases, determine the validity of its transfer or alienation, unless there be some positive or customary law of the country in which it is situated to the contrary.

To entitle the United States under the act of Congress of 3 March, 1797, s. 5, to have any debt due to them first satisfied out of the property of an insolvent, where the latter has made a voluntary assignment for the benefit of his creditors, there

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must be an actual insolvency though not a declared one, and the assignment must have been a general one ; but a party cannot, by assigning all his property by different acts, defeat the priority of the United States, under the pretext of the assignments being partial.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

The facts of this case are stated in detail in the opinion pronounced by

GARLAND, J. In the month of January, 1842, the United States, by their attorney for the Eastern District of Louisiana, filed their petition claiming of the Bank of the United States, chartered by the State of Pennsylvania, the sum of \$1,986,589 04, with interest at the rate of six per centum per annum, from the 3d of March, 1835, until paid. The foundation of this claim was a bond given by the bank, in part payment to the United States, of the stock held by them in the bank chartered by Congress in 1816, and purchased by the state institution. An attachment was taken out, and property seized, and garnishments levied in the hands of different debtors to the bank, to the amount of upwards of \$2,000,000, under the laws of this State. About two months after this petition was filed, a supplemental petition was presented, in which it was stated, that the bank was only indebted to the plaintiffs in the sum of \$365,756 80, with interest on various portions thereof, from different dates. The amount claimed on the bond, was reduced to \$89,606 01, with six per cent. interest from the 27th day of November, 1840, until paid. The remainder of the last amount was made up of certain sums claimed as being due from different branches of the old bank, the officers of which had acted as pension agents for the government, previous to the expiration of its charter, and the amount of a judgment for \$251,243 54, obtained by the plaintiffs in the Circuit Court of the United States, held in Philadelphia, against the defendants ; it being for debts alleged to be owing by the old bank.

In this supplemental petition it is alleged, that the bank established by Congress, on the 2d of March, 1836, made a transfer of all its property, debts, rights and interests, to the State bank, with a condition and upon trust, that the new institution should pay all the debts and liabilities of the old one, arising out of any of its transactions, which transfer and assignment were accepted

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upon that express trust and condition. A continuance of the attachment was prayed for, a great number of garnishees were cited and interrogated as to their indebtedness, and a judgment asked as before stated.

The court appointed attorneys to represent the absent defendants, and they filed an answer, which contains a qualified denial of the claims presented. They say, that as to the judgment obtained in Pennsylvania in the Circuit Court of the United States, a writ of error has been sued out by the bank, upon which the case is pending in the Supreme Court of the United States; wherefore they ask for a suitable delay, until the result of said appeal shall be ascertained, so that the defendants may have the benefit of a reversal of said judgment, should such reversal be made.

The answer then proceeds to claim various amounts in compensation, which it is not necessary to state in detail, as from the judgment rendered against the bank there is no appeal.

Before the answer of the defendants was filed, John Bacon, A. Symington and Thomas Robins, of Philadelphia, presented their petition of intervention, in which they represent, that proceedings had been commenced, as before stated, by the plaintiffs against the defendants, in which an attachment was unlawfully issued, under color of which the plaintiffs had caused the sheriff to seize, attach, and take into possession, certain bills, promissory notes, securities, evidences of debt and property to a great amount, to wit, of the value of more than \$1,500,000, all of which were at the time, in the lawful possession of W. W. Frazier then in New Orleans, who then was and is the agent of said intervenors. They say, that the possession of the sheriff was obtained by force, under the pretence of said writ of attachment. They say, that they cannot accurately describe said bills, notes and assets, as they are all in the hands of the sheriff, and access to them refused, until a complete inventory can be made. They allege, that all of said property, assets, notes, bills receivable, &c., are their property, by virtue of a good and valid assignment, for a valuable consideration, for just and lawful purposes and uses, from the said Bank of the United States, which they will in due time produce and exhibit. They say that, at the time of the aforesaid unlawful

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seizure, the said effects were not liable to be attached or seized in any action against the bank, as that institution had no interest nor right of property in them.

These petitioners therefore pray, that they may intervene and claim all the property and evidence of debts so attached, and taken from their agent or sub-agents, and that, after due proceedings had, it be so decreed, and restored to their lawful possession; and that until further orders, the sheriff be directed to keep possession of the same. They further pray, by way of reconvention, for damages against the sheriff, and all parties concerned.

About two months after this petition was received, the same intervenors presented a supplemental petition, in which they specially set forth the deed of assignment made to them by the bank on the 7th of June, 1841, in Philadelphia, of all the property mentioned therein, and in a schedule annexed, for particular and lawful uses and trusts, therein stated. They say, that said deed of transfer and assignment is good and valid according to the laws of Pennsylvania, where it was executed, and is so according to the laws of this State; and that all of said property and assets were delivered to them, long anterior to the institution of this suit. The petition then repeats the allegations in relation to the illegal proceedings of the parties and sheriff, and specifies, by reference to the inventory, the items and property claimed, also the fact of its all being in the possession of their agent or sub-agents. They specially aver the illegality of the proceedings under the second attachment, which was levied on all the property claimed by them, after their first petition was filed, and say, that it was informal, illegal and null, and was wrongfully and illegally levied on said property.

The petition concludes with a prayer, that the assignment may be declared good and valid, and that all the property designated be decreed to belong to them, and that the proceedings as to them may be dismissed with damages.

The attorney representing the United States filed several exceptions to the proceedings of the intervenors, which were overruled; and as, in this court, they have not been mentioned, we presume they are abandoned. He then answered by a general denial, and an averment, that the several deeds of trust or assignment, executed by the

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Bank of the United States to the aforesaid intervenors, on the 7th day of June, 1841, or at any other time, were, and are null and void. That, on the 1st of May, 1841, and at all other times since, the defendants have not had sufficient property to pay their debts, whereby the United States, who were creditors at that date, as set forth in their petition, have acquired a right of preference and priority over all other persons, upon all the property seized, the said assignment being voluntary and general. He further avers, that said transfer and assignment was not made for the benefit of the United States, one of the creditors of the bank, but for the purpose of evading the laws, and to deprive the United States of their priority and preference as aforesaid.

The answer then sets forth, that at the time the aforesaid deed of assignment was made and executed, the Bank of the United States was insolvent, and, that not having property to pay their debts, said deed of assignment was made to give illegal advantages and preferences to some creditors and to deprive others of their rights, wherefore, the same is illegal, fraudulent and null, being made in violation of the laws of the United States, and of the States of Pennsylvania and of Louisiana. It is, therefore, prayed, that said deed of trust or assignment may be declared null and void, and that the petition of intervention may be dismissed.

A few days after the filing of this answer, James Robertson, James S. Newbold, Herman Cope and Thomas S. Taylor, all residents of the city of Philadelphia, presented their petition of intervention in which they say, that they are the assignees of the Bank of the United States, by legal assignments, dated on the 4th and 6th of September, 1841, made in the State of Pennsylvania, by which said bank assigned, transferred and delivered to them certain bills, notes, assets and other property, seized by the sheriff, which are designated on the inventory made by him, by the letter S in red ink, which are not included in the assignment to Bacon, Symington and Robins, the other intervenors. The petition then proceeds, with a change of names and dates, to aver, in terms nearly similar to that of Bacon and others, that the assignment to Robertson and others was made for a good and legal consideration, for certain uses and trusts therein contained, to wit, the payment of various creditors of the bank; that it is valid, according to law; and that the property attached belongs to them as such

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trustees, and has been illegally and wrongfully seized and attached, it having been really delivered to, and in possession of the agents of petitioners, at the time of seizure. They further allege, that the attachment, which issued on the 25th of March, 1842, was illegally and informally issued, as well as executed. They therefore pray, that the deeds and assignments to them be declared legal and valid, and that a judgment be rendered ordering the property to be restored, and the demand of plaintiffs to be dismissed.

To this petition the attorney of the United States, after certain exceptions similar to those heretofore mentioned were overruled, filed an answer, in which he repeats the same objections to the assignments and deeds under which these intervenors claim, as he had set up against that under which Bacon and others claim, re-asserting his allegations of fraud and illegality in strong terms, also the charges of the insolvency of the bank, and the intention to defeat its creditors, and particularly the United States. He, therefore, prays, that the said assignments may be declared null and void, and that a judgment may be rendered in favor of the plaintiffs, with a priority and preference according to law.

As between the bank and the United States, the cause was tried in February, 1843, and a judgment rendered in favor of the latter, for three hundred and sixty-six thousand, eight hundred and two dollars and sixty-two cents, with interest at six per cent per annum, on various portions thereof, from various dates therein mentioned; reserving to the intervenors all their rights, to be subsequently investigated and tried; neither party to be prejudiced by the judgment. From this judgment the bank does not appear to have appealed.

Upon the issues thus stated, the United States and the whole of the intervenors went to trial.

The evidence shows, that when the charter of the Bank of the United States chartered by Congress, was about to expire in 1835, a new charter for the same institution was obtained from the Legislature of Pennsylvania, in the month of February of that year. The provisions of the old charter were retained, except in those particulars necessary to accommodate the new institution to the change of circumstances; and some additional provisions were made, so as

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to give greater efficiency to the new bank. See the charter of the Bank of United States, 6th Vol. Laws U. S. pp. 35 to 50, and the charter granted by the State of Pennsylvania in 1836.

The old charter says, that the corporation shall be "able and capable, in law, to have, purchase, receive, possess, enjoy and retain, to them and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects, of whatsoever kind, nature and quality, to an amount not exceeding, in the whole fifty-five millions of dollars, including the amount of the capital stock aforesaid; and the same to sell, grant, demise, alien, or dispose of; and generally to do and execute all and singular the acts, matters and things which to them it shall or may appertain to do," subject only to the laws of the United States and the provisions of the charter. The second section of the State charter is very nearly in the same words, and confers full power in relation to the purchase, alienation, and disposition of the property of the corporation.

The stockholders of the old bank met, soon after the new charter was granted, and accepted it. They also directed the directors of the old bank to convey to the new corporation, all the property and assets belonging to it, for the purpose of paying the debts of the old corporation; and the new one took said property and assets, subject to that condition. In the resolutions passed, it is designated as a trust for those purposes; and the United States are especially mentioned as a creditor to be paid. The new bank, with the old name, transacted business for several years, not only in Pennsylvania, but elsewhere, and particularly in Louisiana, to a very large amount. A contract was made with the United States government, for the purchase of its stock in the old bank, a part of the price of which constitutes a portion of the present demand, and the remainder of it consists of items of indebtedness by the old bank.

In the latter part of the year 1840, or in the commencement of the year 1841, the Bank of the United States wishing to resume specie payments with the other banks in Philadelphia, agreed to give them post-notes, payable at a future period, for the balances owing to them, with a promise of security if required, to insure their payment. It resumed on the 15th of January, 1841, but at

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the expiration of fifteen days had to stop again. This suspension seems to have given a severe blow to the credit of the bank, and various meetings of the stockholders were held, to examine into its condition, the causes of its suspension, and for other purposes not necessary to be now stated. On the 8th of April, 1841, a meeting of the stockholders was held, and it was resolved, "that a part of the assets of the bank be placed in the hands of trustees, as a pledge for securing the ultimate payment of its post-notes, circulation and deposits, in the event of an arrangement being made with the other city and county banks to receive its notes in payment and on deposit; and, in case such arrangements should fail to be made, then in trust for the security of the present circulation and deposits."

At a meeting of the stockholders held on the 4th of May, 1841, Mr. Drayton, the president of the bank, reported to them, that a committee of the directors had been appointed, to carry into effect the resolution above mentioned, "and had succeeded so far as it regards the post-notes held by the Philadelphia banks; but for want of legislative action to grant power for creating the trust, without securities now required by law, they had not yet succeeded in complying with the wishes of the stockholders in reference to the circulation and deposits." This report led to a long discussion, and a preamble and resolution were offered stating that, in the opinion of the stockholders, the assignment so made was in derogation of the authority of the stockholders, and therefore not approved by them. The preamble and resolution were finally rejected. Mr. Josiah Randall, a gentleman who is much relied on as a witness in this case by the plaintiffs, then offered a resolution directing the board of directors, "forthwith to pledge funds to protect the circulation of, and deposits in, the bank." After various attempts to amend this resolution, and much discussion, it was finally adopted.

The assignment reported by the president, was one of assets to the value of \$7,772,250 33, dated May 1st, 1841, conveyed to James Dundas and others, as trustees for the purpose of securing the payment of the post-notes given to the Philadelphia city and county banks, before mentioned. It is not material to state the purposes of this assignment and trust, further than to say, that

its object was as above stated. The trustees were to collect the debts transferred to them, and to apply the proceeds to the purpose stated. The trust was to expire at the end of two years, unless extended by consent. The validity of this deed is not before us, as none of the property mentioned in it is in this State, nor any of the parties before the court. It is only mentioned as a part of the series of transfers, and to be noticed in reference to a point which comes up for consideration. We shall only remark, *en passant*, that this deed of assignment has been held valid and good by the Supreme Court of Pennsylvania, in the case of *Dana v. The Bank of the United States, Dundas, &c. Garnishees*, recently decided.

To procure the legislative action, reported by Mr. Drayton to be necessary, to pledge or assign the assets to secure the circulation and deposits of the bank, a committee of the board of directors was appointed to wait on the legislature, then in session, to procure the passage of a law, relieving the assignees or trustees from the obligation of giving bond and security, in double the amount of the appraised value of the property assigned; and for some other facilities, to enable the corporation to carry out the wishes of the stockholders. For a better understanding of this case copious extracts from the laws of Pennsylvania relative to assignees and trustees are inserted herein, which are as follows:—

An Act relating to assignees for the benefit of creditors, and other trustees, approved 14th June, 1836.

Sect. 1. In every case in which any person shall make a voluntary assignment of his estate, real or personal, or of any part thereof, to any other person or persons, in trust for his creditors, or some of them, it shall be the duty of the assignee or assignees, within thirty days after the execution thereof, to file in the office of the prothonotary of the court of Common Pleas of the county in which the assignor shall reside, an inventory or schedule of the estate or effects so assigned, accompanied with an affidavit by such assignees, that the same is a full and complete inventory of all such estate and effects, so far as the same has come to their knowledge.

Sect. 2. It shall be lawful for the court of Common Pleas of such county, or for any judge thereof, in vacation, to appoint

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two or more disinterested and competent persons, to appraise the estate and effects so assigned.

Sect. 3. The appraisers so appointed, or any two of them, having first taken an oath or affirmation, before some person having authority to administer oaths, to discharge their duties with fidelity, shall forthwith proceed to make an appraisement of the estates and effects assigned, according to the best of their judgment, and having completed the same shall return the inventory and appraisement to the court, where it shall be filed of record.

Sect. 4. The appraisers aforesaid shall receive the same compensation as is now allowed by law to appraisers of the estate of a decedent.

Sect. 5. The assignee or assignees as aforesaid, shall, as soon as such inventory and appraisement shall have been filed, give a bond or bonds, with at least two sufficient sureties, to be approved of by one of the judges of the said court, in double the amount of the appraised value of the estate so assigned.

Sect. 6. The bond so to be given, shall be taken in the name of the commonwealth of Pennsylvania, and the condition thereof shall be as follows, viz:

The condition of this obligation is such, that if the above bounden A. B. and C. D. assignees of E. F., shall, in all things, comply with the provisions of the acts of assembly in such case made, and shall faithfully execute the trust confided to them, then the above obligation to be void, otherwise to be and remain in full force and virtue.

And such bond shall be filed in the office of the prothonotary of the said court, and shall by him be entered of record, and shall enure to the use of all persons interested in the property assigned.

Sect. 7. It shall be lawful for the court of Common Pleas of the proper county, on the application of any person interested, "*co-trustee or co-assignee*," to issue a citation to any assignee or trustee for the benefit of creditors, whether appointed by any voluntary assignment, or in pursuance of the laws relating to insolvent debtors and domestic attachments, requiring such assignee or trustee to appear and exhibit, under oath or affirmation, the accounts of the trust in the said court, within a certain time, to be named in such citation.

Sect. 8. *Provided*, That no such citation shall be issued, until after the expiration of one year from the date of the assignment to, or appointment of such assignees or trustees.

Sect. 9. The several courts of Common Pleas shall, by a general order, or by such order as the circumstances of any particular case may require, direct the prothonotary of the same court to

give notice of the exhibition and filing of every account as aforesaid, during such time, and in such public newspapers as they shall appoint, setting forth in such notice, that the accounts will be allowed by the courts, at a certain time, to be stated in such notice, unless cause be shown why such account should not be allowed.

Sect. 10. The expense of advertising as aforesaid, shall be paid by the assignees or trustees, at the time of exhibiting their accounts as aforesaid, and shall be passed to their credit in such account.

Sect. 11. Whenever it shall be made to appear in (to) a court of Common Pleas having jurisdiction as aforesaid, that an assignee or trustee as aforesaid, has neglected or refused, when required by law, to file a true and complete inventory, or to give bond with surety, when so required by law, or to file the accounts of his trust, or that such assignee or trustee is wasting, neglecting, or mismanaging the trust estate, or is in failing circumstances, or about to remove out of the jurisdiction of the court, in any such case, it shall be lawful for such court to issue a citation to such assignee or trustee, to appear before the court, at a time to be therein named, to show cause why he should not be dismissed from his trust.

Sect. 12. On the return of such citation, the court may require such security, or such other and further security, from such assignee or trustee, as they may think reasonable, or may proceed at once to dismiss such assignee or trustee from the trust.

Sect. 13. The like proceedings may be had, whenever it shall be made to appear to such court, that any person who shall have become surety for any assignee or trustee as aforesaid, in any bond, given for the due execution of the trust, is in failing circumstances, or has removed out of this commonwealth, or signified his intention so to do.

Sect. 14. An assignee or trustee as aforesaid, may, with the leave of the court having jurisdiction as aforesaid, make a voluntary settlement of his accounts, so far as he may have executed the trust, and the same being filed in the office of the prothonotary of the court, the like proceedings shall be had thereon as in the case of a settlement of such accounts after citation.

Sect. 20. When any assignee or trustee shall have been duly declared to be a lunatic or habitual drunkard, or shall have removed from the State, or ceased to have a known place of residence therein, during the period of a year or more, it shall be lawful for the court having jurisdiction, on due proof thereof, to dismiss such assignee or trustee.

Sect. 21. When any assignee or trustee shall be dismissed from the trust, it shall be lawful for the court to order and direct all

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books, papers, moneys, and effects in the hands of such dismissed assignee or trustee, to be forthwith delivered or transferred to such other person or persons, as the court may appoint to receive the same, upon security being given by such receiver, according to the order of the court.

Sect. 22. The court having jurisdiction as aforesaid, shall have power, upon the application by bill or petition of any assignee or trustee, setting forth such facts as in equity would entitle him to relief, to discharge him from the trust: *Provided*, That no such discharge shall take place, unless the accounts of such assignee or trustee shall have been duly settled or confirmed as aforesaid, so far as he shall have acted in the trust, not unless notice of such application shall have been given to all parties interested, either personally, or by advertisement, in such public newspapers as may be directed by the court, nor until such assignee or trustee, shall have surrendered the trust estate remaining in his hands, to some other assignee or trustee, or other person appointed by the court to receive the same, and shall have performed all such other matters as may be required in equity.

Sect. 23. The several courts having jurisdiction as aforesaid, shall have power to appoint assignees or trustees as aforesaid, in the following cases, viz:

1. When any sole assignee or trustee shall renounce the trust, or refuse to act under, or fully execute the same:

2. When any such assignee or trustee shall die, or be dismissed by the court from the trust, or shall be discharged by the court therefrom:

3. When one or more of several assignees or trustees, shall renounce or refuse as aforesaid, or shall die, or be dismissed or discharged as aforesaid, and the duties of the trust require the joint act of the trustees:

4. In any case in which a trust shall have been created, and no person appointed, either by name or by description, to execute the same.

Sect. 24. The power of appointment as aforesaid, may be exercised on the application by bill or petition, of any person interested in the estate, or property which is the subject of the trust, and not otherwise, and after due notice to all parties concerned.

Sect. 25. Every assignee and trustee appointed by the court as aforesaid, shall be liable to the same duties, shall have the same powers and authorities in relation to the trust, or to the further execution of the same, as the case may be, and shall be subject to the jurisdiction and control of the court, in the same manner, to all intents and purposes, as his predecessor or predecessors, in the trust.

Sect. 26. Upon the appointment by the court of any assignee

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or trustee as aforesaid, and upon his giving security, if he shall be so required by the authority of the law, all the trust estate, and effects whatsoever, shall forthwith, and without any act or deed, pass to and be vested in such succeeding assignee or trustee.

Sect. 27. When any assignee or trustee shall have been discharged by the court as aforesaid, from the further execution of the trust, it shall be lawful for the court to make an order that the sureties of such assignee or trustee in any bond, which may have been given by him, for the due execution of the trust, shall, upon compliance by such assignee or trustee, with all orders of the court in the premises, be discharged from liability for any acts of such trustee after the date of such order.

Sect. 28. It shall be lawful for the court having jurisdiction as aforesaid, to make such orders and decrees from time to time, for carrying into effect any trusts as aforesaid, either for distribution of moneys in the hands of assignees, or trustees for the benefit of creditors, or for the payment or transfer of funds or effects in the hands of other trustees, or otherwise, as shall be according to law, or the terms or intent of the trust.

Sect. 29. It shall be lawful for any court having jurisdiction as aforesaid, whenever compensation shall not have been otherwise provided, to allow such compensation to assignees, and other trustees, out of the effects in their hands, for their services, as shall be reasonable and just.

Sect. 30. The several courts aforesaid, shall have power, on the application of the party interested, to compel the conveyance by trustees, of the legal estate, when the trust has been executed, or has expired.

Sect. 31. It shall be lawful for the court in which the accounts of any assignee or trustee as aforesaid, may be exhibited, to refer the same to an auditor or auditors, who shall be sworn or affirmed, well and truly to audit and adjust the same, and make a true report thereof, according to the evidence.

Sect. 32. The several courts of Common Pleas, and all auditors appointed by them for the purpose of examining the accounts of assignees and trustees aforesaid, shall have power to examine such assignees and trustees, upon oath or affirmation, touching the execution of the trust, and the said courts shall have power to compel the production of any books, papers or other documents necessary to a just decision of any question before them, or before auditors, as aforesaid.

Sect. 33. The several courts of Common Pleas shall have the same powers and authorities; and the manner of proceeding to obtain the appearance of persons amenable to their jurisdiction, in cases of trusts, and to compel obedience to their orders and decrees, and enforce execution thereof, shall be the same as are now

by law vested in and provided for the several Orphans' courts of this commonwealth.

Sect. 34. It shall be lawful for any judge issuing a citation to any assignee or trustee, as herein before provided, if the circumstances of the case shall appear to him to require it, to order such citation to be returned to a special court, to be convened for the purpose, in the manner allowed by the laws relating to the Orphans' courts.

Sect. 35. When any assignee or trustee shall remove out of the county in which he resided at the time of his appointment, or of the commencement of the trust, as the case may be, or shall not possess real or personal estate in such county, sufficient to satisfy any order or decree of the court of Common Pleas of such county, it shall be lawful for such court to issue process to the county in which such assignee or trustee may be, or in which he may have any real or personal estate amenable to such process, and such process shall be executed by the sheriff or coroner, as the case may require, of the county in which such assignee or trustee may be, or may have any real or personal estate, as aforesaid.

Sect. 36. Any person aggrieved by a definite (definitive) decree or judgment of any court of Common Pleas, in any case relating to assignees or trustees as aforesaid, may appeal from the same to the Supreme Court in the proper district: *Provided*, Such appeal be entered within one year after such decree or judgment, in cases relating to assignees or trustees, for the benefit of creditors, as aforesaid, and within three years of other cases of trust: *And provided also*, That in all cases, the party appealing shall first give security, in such sum as the said court of Common Pleas shall direct, conditioned to prosecute such appeal with effect, and shall also make oath of affirmation, that such appeal is not intended for delay.

Sect. 37. "Nothing in this act shall be so construed, as to impair or affect the powers and jurisdiction conferred by act of assembly on any district court of this commonwealth."

The efforts of the committee appointed by the board of directors to procure legislative action, were so far successful as to obtain the passage of two acts very similar in their provisions. One of them was passed on the 4th of May, 1841, by a majority of two-thirds, notwithstanding the veto of the governor. The other was passed on the 5th of May, 1841, and received the assent of that functionary. It is not necessary to the decision of this case, that a history should be given of the parliamentary tactics that placed two laws, so similar in their provisions, on

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the statute book. It is enough for us that they are there, and it is our duty to give such effect to them as we can.

*Extract from an Act of the Legislature of Pennsylvania, of
4 May, 1841.*

Sect. 17. That to enable the banks of this commonwealth to comply with the provisions of this act, and to relieve the community, it is further enacted that, no banking institution in this state shall be subject, by way of penalty, or otherwise, to any greater rate of interest than six per cent per annum, any thing in any act of assembly to the contrary notwithstanding; and the resolution entitled "a resolution providing for the resumption of specie payments by the banks and for other purposes," passed the third of April, eighteen hundred and forty be and the same is hereby repealed; and that all provisions of any other act of assembly heretofore passed, or of any act of incorporation providing for the forfeiture of any charter for or by reason of the non-payment of any of its liabilities on demand, be and the same are hereby suspended until further legislative action, and until the legislature shall provide for the repayment of the loan authorized by the first section of this act; and so much of any act of assembly as prohibits the banks of this commonwealth from making loans and discounts, issuing their own notes, or declaring dividends during the suspension of specie payments, be and the same is hereby suspended as aforesaid; but no bank, during such suspension, shall declare dividends to an amount exceeding five per centum per annum. *Provided*, That before the Bank of the United States shall be entitled to the benefits of this section, the stockholders of said bank shall, by a resolution adopted by any general or adjourned meeting, held in pursuance of the charter of said bank, and duly certified to the Governor, under their corporate seal consent to be subject to any general laws to be hereafter passed for the regulation of the banks of this commonwealth.

Sect. 18. That if the stockholders of the Bank of the United States, at an adjourned general meeting, to be held at their banking house, on the fourth day of May, eighteen hundred and forty-one, or any other day to which the said meeting shall be adjourned, or at any other general meeting held in pursuance of their charter, shall decide by a majority of the votes then and there present or represented, according to the scale of votes allowed at elections of directors, that it is expedient for the Bank of the United States to make a general assignment of the real and personal estate, goods, chattels, rights and credits whatsoever and wheresoever, of the said corporation, to trustees, for the payment or securing the payment of the debts of the same, and shall, moreover, by a

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like vote, elect five or more persons as trustees for that purpose, then, and in such case, it shall be the duty of the directors of the said bank, in the corporate name and under the corporate seal of the president, directors and company of the Bank of the United States, forthwith to make and execute such an assignment, and to do all such acts as shall be necessary to give full possession of the assigned estate and effects to the trustees, so elected upon the trusts of the said assignment.

Sect. 19. That the said assignment, so made as aforesaid, shall be deemed and taken to vest immediately in the said trustees and their successors, all the estate, real and personal, goods and chattels, rights and credits whatsoever and wheresoever, in like manner, and to the same extent, as they were previously vested in the in the said corporation, but upon the trusts of the said assignment, and that so much of any law or laws of this commonwealth as requires security from trustees or assignees, or an inventory or appraisement of the property assigned or conveyed, in trust, be and the same is hereby dispensed with in the case of any assignment or deed of trust, or other conveyance, which may be made by the president, directors and company of the Bank of the United States for securing the payment of any portion of its liabilities; *Provided, however,* That the said stockholders may at any general meeting, at which said assignment may be authorized, require an inventory of the property assigned; and if they deem it expedient to do so, security, in such sum as they may deem expedient, from the trustees aforesaid, for the faithful performance of their duty.

Sect. 20. It shall be lawful for the said stockholders at such meeting, and by such vote as aforesaid, to give the said trustees such powers over the assigned estate and effects as they may deem expedient, not inconsistent with the said trust, for the payment, or securing the payment, of the debts of the corporation, in manner aforesaid; and also to impose such regulations upon them in regard to the manner of executing the said trusts, keeping and rendering accounts of the same, and making dividends among the creditors, and in regard to the responsibilities of the said trustees, and their compensation and allowance, and also in regard to the expenses of the trust, as they may deem right; all which powers, regulations, and provisions, shall be introduced into the said assignment: *Provided,* That the said trustees, or any trustees or assignees appointed for the payment, or securing the payment, of all or any portion of the debts of the said bank, shall receive in payment of debts due to the said bank to them, at par, the notes or other evidences of debt issued or created by said bank.

Sect. 21. That the trustees so elected shall hold their appoint-

ment until the first Monday in January next, and until other trustees shall be elected in their place; and it shall be lawful for the said stockholders, on the said day, by a like vote, to choose the same, or other persons, to act as trustees aforesaid for another year, and until others shall be chosen in their place; and so on from year to year, so long as the said trust shall continue; and until it be completely executed, the said stockholders, on the first Monday in January in each year, shall be authorized in manner aforesaid, to choose new trustees in the place of any or all the existing trustees, and it shall be the duty of the trustees whose place shall be supplied in the trust, together with any trustee continuing in the same, to execute such instrument as shall vest the trust estate, and effects, in all the trustees who are to act in trust for the ensuing year.

Sect. 22. That the corporate powers of the said corporation, after the said assignment shall be made and executed as aforesaid, shall cease and determine, except so far as the same may be necessary for the following purposes, that is to say:

First, for the purpose of suing and being sued, and for continuing all suits and proceedings at law, or in equity, now pending for or against said corporation.

Second, for the purpose of making such assurances, conveyances and transfers, and doing all such acts, matters, and things as may be necessary or expedient to make the said assignment on the trust thereof effectual.

Third, for the purpose of citing the said trustees to account, and compelling them to execute the said trusts.

Fourth, for the choosing of directors, for the purpose of receiving and distributing amongst the stockholders of the said bank such surplus as shall remain after discharging the debts of the said corporation.

Sect. 23. That the courts of this commonwealth shall have jurisdiction of the said trust and of the affairs thereof in like manner as if the same were created under any general law of the State; and it shall moreover be lawful for the legislature, and the power is hereby expressly reserved, at any time or times, with the consent of the said stockholders at a general meeting, for that purpose convened according to the charter, to change and alter the provisions of this act, in such manner as to the legislature may seem expedient.

Sect. 24. That from and after such general assignment, it shall not be lawful for the said corporation to exercise the banking privileges of loaning money and issuing notes or bills, but it shall be confined to the exercise of its other corporate powers and privileges, for the purpose of the final settlement of its affairs,

and for the sale and disposition of its estate, real, personal, and mixed.

Extract from the Act of the Pennsylvania Legislature of May 5th, 1841.

Sect. 4. That if the stockholders of the Bank of the United States, at an adjourned general meeting to be held at their banking house, on the fourth day of May, one thousand eight hundred and forty-one, or on any other day to which the said meeting shall be adjourned, or at any other general meeting held in pursuance of their charter, shall decide by a majority of the votes then and there present or represented, according to the scale of votes allowed at elections of directors, that it is expedient for the Bank of the United States to make a general assignment of the real and personal estate, goods, chattels, rights and credits whatsoever and wheresoever, of the said corporation, to trustees, for the payment or securing the payment of the debts of the same; and shall moreover, by a like vote, elect five or more persons as trustees for that purpose, then, and in such case, it shall be the duty of the directors of the said bank, in the corporate name and under the corporate seal of the president, directors and company of the Bank of the United States, forthwith to make and execute such an assignment, and to do all such acts as shall be necessary to give full possession of the assigned estate and effects to the trustees so elected, upon the trusts of the said assignment.

Sect. 5. That the said assignment so made as aforesaid, shall be deemed and taken to vest immediately in the said trustees and their successors, all the estate, real and personal, goods, chattels, rights and credits whatsoever and wheresoever, in like manner and to the same extent as they were previously vested in the said corporation, but upon the trusts of the said assignment; and that so much of any law or laws of this commonwealth, as requires security from trustees or assignees, or an inventory or appraisement of the property assigned or conveyed in trust, be and the same is hereby dispensed with, in the case of any assignment, or deed of trust, or other conveyance which may be made by the president, directors and company of the Bank of the United States, for securing the payment of all or any portion of its liabilities: *Provided, however,* That the said stockholders may at any general meeting, require an inventory of the property assigned, and, if they deem it expedient to do so, security in such sum as they may deem expedient from the trustees aforesaid for the faithful performance of their duty: *Provided further,* That it shall and may be lawful for the Court of Common Pleas of Philadelphia County, upon the petition of any person or persons interested, to require the said trustees to file an inventory and appraisement of the as-

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signed estate and effects, and to give such security severally as the said court may deem sufficient to secure the faithful execution of the said trust.

Sect. 6. It shall be lawful for the said stockholders at such meeting and by such vote as aforesaid, to give to the said trustees such powers over the assigned estate and effects as they may deem expedient, not inconsistent with the said trust, for the payment or securing the payment of the debts of the corporation in manner aforesaid, and also to impose such regulations upon them in regard to the manner of executing the said trusts, keeping and rendering accounts of the same, and making dividends among the creditors, and in regard to the responsibilities of the said trustees and their compensation or allowance, and also in regard to the expenses of the trust as they may deem right; all of which power, regulations and provisions shall be introduced into the said assignment: *Provided*, That the said trustees or any trustees or assignees appointed in pursuance of the provisions of this act, for the payment or securing the payment of all or any portion of the debts of said bank, shall receive in payment of debts due to the said bank, or to them, at par, the notes or other evidences of debt issued or created by said bank.

At the very moment that proceedings were going on at Harrisburg, to procure the passage of some law, to dispense the trustees or assignees proposed to be appointed, from giving bond and security according to the general law, and from making an inventory or schedule of the property and assets assigned, the stockholders were in session at Philadelphia; and it appears, that the president of the bank was in almost daily communication with the committee of the directors, and reporting to the stockholders what was going on in the legislature. On the very day that the first law was passed, Mr. Randall's resolution to *pledge forthwith* the funds of the bank was passed. It would appear from this, that the stockholders intended to act on the assumption of what would be done by the legislature. In fact they were informed on the 4th of May of what the legislature had done, but at the same time were told, that the governor had not yet acted on the bill, which he on that day vetoed.

On the 18th of May, 1841, another meeting of the stockholders was held, when the acts of the legislature were laid before them. They were examined by a committee, a report was made, and the 17th section of the act of May 4th, 1841, was accepted

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by a special resolution. At the same meeting, Mr. Drayton, the president of the bank, informed the stockholders that, "the directors had found it difficult to carry into effect a resolution of the stockholders, authorizing an assignment in favor of the bill holders and depositors, as trustees could not be found to labor without compensation, which had not been provided for." After some explanation, Mr. Randall offered the following resolution; "*Resolved*, that the board of directors be, and they are hereby authorized to exercise their own discretion as to the expediency, as well as to the time and manner of carrying into effect the resolution adopted at the last meeting, for pledging certain assets in trust, for the payment of the circulation of, and deposits in, the bank." After an ineffectual effort to amend this resolution, it was adopted. Thus having three distinct resolutions of the stockholders, passed at different meetings, authorizing them to proceed, also two acts of the legislature which they presumed gave them authority to act, and backed by the advice and opinions of such legal advisers as John Sergeant and Horace Binney Esquires, and other able counsel, the president of the bank, William Drayton, (himself a distinguished jurist, a well known citizen and representative in former times in the national councils,) acting under a resolution of the board of directors, signed the deed of the 7th of June, 1841, whereby was conveyed, assigned, transferred and delivered to John Bacon, Alexander Symington, and Thomas Robins, the intervenors in this suit, property and assets amounting to \$12,473,800 60, "for the purpose of securing the payment of the circulation, deposits and bank balances." And this is the instrument charged here to be fraudulent, collusive and null, as being made to cheat the creditors of the bank. That the full force and effect of the instrument may be seen, as well as the objections to it discovered, it is set forth at length.

Assignment to secure the Payment of Notes and Deposits.

This indenture, made the seventh day of June, in the year of our Lord, one thousand eight hundred and forty-one, by and between the President, Directors and Company of the Bank of the United States, of the one part, and John Bacon, Alexander Sym-

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ington and Thomas Robins, of the other part; whereas the said party of the first part are indebted to sundry persons, depositors in the said bank, and the branches or offices thereof; and also to sundry persons, holders of notes of the late Bank of the United States, incorporated by Congress; and to sundry persons, holders of notes of the present bank, being notes of the ordinary kind, payable on demand, and commonly used in circulation; and also to sundry persons, holders of notes of the said bank, commonly called post-notes, (other than post-notes held by or issued to certain banks in the city and county of Philadelphia, for which security was provided and given by an indenture bearing date the first day of May, in the present year, and which are not intended to be provided for and embraced in the present indenture;) and whereas, the said party of the first part has resolved and agreed to provide an adequate security for the payment of the said deposits, and of the said notes, and of the said post-notes, (save and except the said post-notes heretofore provided for, as above said,) and of the interest to accrue upon them:

Now this indenture witnesseth, that the said party of the first part, as well for the consideration aforesaid, as for and in consideration of the sum of one dollar, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof they do hereby acknowledge, have given, granted, bargained, sold, aliened, enfeoffed and delivered, assigned, transferred and set over, and by these presents do give, grant, bargain, sell, alien, enfeoff and deliver, assign, transfer and set over, to the said party of the second part, all and singular the lands, tenements, and hereditaments, goods, chattels, moneys, rights, credits and effects of the said party of the first part, contained, described and set forth in a certain schedule hereto annexed, sealed with the seal of the said party of the first part, and bearing even date herewith, together with all deeds, papers and evidences belonging or relating thereto; to have and to hold all and singular the premises hereby given or granted, or intended so to be, to the said party of the second part, and the survivors and survivor of them, and the heirs, executors, administrators and assigns of the survivor, to and for their and his own use and benefit forever, as joint tenants, and not as tenants in common. In trust, nevertheless, to and for the following uses, purposes and trusts, and to and for no other use or purpose whatsoever, that is to say, in trust, in the first place to enter upon the said real estate hereby granted, and to sell and dispose of and convey the same in fee simple, or for any less estate by public or private sale, for cash or on credit, for the best price that can be had for the same, as may seem to them most expedient, and to give receipts for the purchase money, so that the purchaser or purchasers shall not be

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accountable for the application of the same ; and in the meantime and until a sale shall be made, to receive the rents, issues and income of the said real estate, and to pay the charges thereon ; and in the next place, in trust, to collect, receive and get in all and singular the moneys due and owing to the said party of the first part, and hereby assigned, and the same, as well as the proceeds of the said estate, safely to keep to and for the uses and purposes hereinafter declared, that is to say :

Firstly, To pay and discharge all reasonable and necessary expenses, costs and charges attending the execution of this trust, in which, however, it is expressly understood and agreed, that the commission charged by or allowed to the trustees shall not exceed one per centum upon the amount collected, nor amount to more than two thousand dollars in any one year to each trustee.

Secondly, From time to time, as often as they shall have moneys on hand of sufficient amount for a dividend, to divide and distribute the same rateably and equally, in and towards the payment of the said deposits, notes and post-notes, (except the post-notes hereinbefore excepted,) and the interest accrued thereon, so that all and each may participate rateably and alike in every such dividend, until the said deposits, notes and post-notes shall be fully paid off and discharged.

And in further trust, from and after the payment and discharge of the said deposits, notes and post-notes, and interest in full, to re-transfer, convey and pay over to the said party of the first part, their successors and assigns, whatever may remain of the premises hereby granted, and all moneys, credits and effects which may have been raised therefrom, or from any part thereof, and not applied to the purposes of the trusts herein and hereby created, together with all debts, papers, evidences and securities relating thereto.

Provided always, nevertheless, and it is hereby expressly declared, understood and agreed, as the condition of this indenture, and of the trusts therein and thereby created, that before the said trustees, their successors or assigns, shall proceed to make or declare any dividend of the moneys raised or collected as aforesaid, they shall give thirty days notice of their intention to do so in two or more daily newspapers of the city of Philadelphia, at least twice a week during the same period of thirty days, calling upon the claimants to come forward and prove their debts ; and such dividend shall be declared and made only on the amounts so brought forward and proved ; and no creditor shall be entitled to claim or receive such dividend who shall not have brought forward and proved his debt before the time appointed for making and declaring the dividend. But if any dividend or dividends shall thereafter be made, such neglecting or defaulting creditor

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or creditors bringing forward and proving his or their claim or claims in time therefor, as aforesaid, shall be entitled to receive in addition to such dividend an amount equal to the rate of dividend or dividends which shall have been before made and paid; and so on from time to time, until a final dividend shall be declared and made; which final dividend the said trustees, their successors and assigns, are hereby authorized and required to declare and make, whenever the moneys arising from the premises hereby granted and assigned, shall by the payment of the said final dividend be disposed of and exhausted, or when all the creditors who have brought forward and proved their claims, be paid in full, principal and interest; it being understood, however, that no interest shall be paid until the final dividend; and from and after such final dividend, no creditor shall have any claim upon the remaining fund, if any there be, nor upon the said trustees, their successors or assigns, for or by reason of these presents, or of the trusts herein and hereby created; but the same except the trust for re-conveying the surplus to the said party of the first part, their successors or assigns, shall thenceforth cease and be determined, and at an end. Provided also, and it is expressly understood and agreed, that if the said party of the first part, their successors or assigns, shall at any time pay off and discharge the said deposits, notes and post-notes, (the said notes and post-notes being surrendered and cancelled,) then and from thenceforth the trusts herein and hereby created, or so much of them as shall then remain unexecuted, shall cease and be determined; and the whole of the trust property then remaining be conveyed, transferred and delivered to the said party of the first part, their successors or assigns. And it is hereby expressly agreed by and between the parties to these presents, as a condition or part thereof, that the said trustees, their successors or assigns, shall not be answerable for the acts, omissions or defaults of each other, but only each for his own acts, omissions or defaults; and that they shall not be answerable for the misconduct, omissions or default of any agent or agents they may find it necessary to employ; being accountable only for the exercise of fair and reasonable skill and judgment, as well in the appointment of such agent or agents, as in the general management of the trust hereby created, if the same be conducted in good faith and intention.

And, the better to enable the said party of the second part, and the survivors and survivor of them, and the executors and administrators of the survivor of them, to execute the said trusts, the said party of the first part do hereby constitute, make and appoint them their true and lawful attorneys and attorney, irrevocable in the premises, for them and in their name, but to and for the uses and purposes of this trust, and at the cost of the same,

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to ask, demand, sue for, and recover and receive all and every sums or sum of money, due or to become due by reason of any matter or thing herein granted and assigned, or intended so to be, to give receipts and acquittances for the same, and generally to act and do as fully and effectually in the premises as they themselves might or could do, and substitute or substitutes one or more under them to nominate and appoint, and again at pleasure to revoke; hereby ratifying and confirming whatsoever they or their said substitutes or substitute may lawfully do in the premises.

It is understood, that the foregoing indenture, or any thing therein contained, is not in any manner to impair or affect the liabilities of the Bank of the United States, nor the rights of depositors or of the holders of the said notes and post-notes.

In witness whereof, the said parties have hereunto interchangeably set their hands and seals, the President, Directors and Company of the Bank of the United States of the first part acting by their president, William Drayton, Esq., at Philadelphia, the day and year first above written.

Signed, W. DRAYTON, *President*. [B. U. S. Seal.]

Attest:

Signed, T. S. TAYLOR, *Cashier*.

Signed, sealed and delivered }
in the presence of us, }
T. S. TAYLOR,
G. W. FAIRMAN.

We accept the trust created by the above indenture of assignment.

Signed,	JOHN BACON,	[L. S.]
"	A. SYMINGTON,	[L. S.]
"	THOMAS ROBINS,	[L. S.]

The following provision was engrossed on the schedule:

The annexed paper writings, paged from 1 to 29, inclusive, and subscribed on the last page with the names of the president of the Bank of the United States, and John Bacon, Alexander Symington, and Thomas Robins, trustees, are the schedules referred to in the annexed indenture of assignment, dated the seventh day of June, A. D. 1841, by and between the President, Directors and Company of the Bank of the United States of the one part, and John Bacon, Alexander Symington and Thomas Robins, of the other part; and it is hereby understood and agreed to by the parties, that if any of the assigned estate, debts and effects herein described shall have been, before the execution and

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delivery of the assignment to which this schedule is annexed, sold, assigned, recovered or extinguished in part or in whole, and other obligations, notes, bills or security for the same shall have been received, given or taken in lieu or on account thereof, such obligations, notes, bills or security so given, taken or received, shall be deemed to be included in this schedule, with the same effect as if the same were hereby particularly and at large described.

In witness whereof, the President, Directors and Company of the Bank of the United States, by their president, William Drayton, Esq., and by an order of the board of directors, have caused their common seal to be affixed this 7th day of June, A. D. 1841.

Signed, W. DRAYTON, *President*. [U. S. B. Seal.]

Attest:

Signed, T. S. TAYLOR, *Cashier*.

Signed, JOHN BACON,
A. SYMINGTON, } *Trustees*.
THOMAS ROBINS, }

Recorded in Deed Book G. S. No. 28, page 412, &c.

State of Pennsylvania, City of Philadelphia :

Before me, the subscriber, mayor of the said city, appeared the above named William Drayton, Esq., personally known to me as the president of the corporation above named, The President, Directors and Company of the Bank of the United States, who being duly sworn according to law, did depose and say, that he executed the above instrument of conveyance as president of the said corporation, and that the above impression is the common seal of said corporation, thereto duly affixed by authority of the board of directors, and that the above deed of conveyance is sealed and delivered as the proper act and deed of the said The President, Directors and Company of the Bank of the United States, for the uses and purposes therein set forth ; and also Thomas S. Taylor, cashier of the said bank, and attesting witness above, who being duly sworn, declares that he was present and did see the said president, William Drayton, Esq., sign the said deed, affix thereto the common seal of the said corporation, and deliver the said deed as the act and deed of the said corporation ; he the said president being the authorized officer of the said corporation, so to sign, seal and deliver. Witness my hand, and the common seal of the said city, the day and year aforesaid.

Signed,

JNO. SWIFT,

Mayor.

[Seal of the City
of Philadelphia.]

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The depositions of several distinguished lawyers in Philadelphia have been taken, and among them, that of Mr. Randall himself, who testify that this deed is legal and valid according to the laws of Pennsylvania. The evidence further shows, that at the time this deed was executed, and previously, the bank was very much embarrassed, and owed large debts both in the United States and Europe. It could not pay specie for its notes or deposits, and the former were at a heavy discount. Some suits had been brought against it, and others were threatened for large sums. The object and expectation was, when this assignment was made, that the bill holders and depositors would be satisfied, and the suits be stopped, as the security was considered ample; but in this the directors were disappointed. The number of suits increased; the bank endeavored to delay them by giving security and thus to postpone the issuing of executions. Thus passed the summer of the year 1841, the condition of things getting worse; and it becoming apparent, that the bank must be ruined by costs of suits, and the sacrifice of property at forced sales, the directors after much deliberation, acting under the authority already given, unanimously came to the conclusion, on the 2d of September, 1841, to make an assignment of the most valuable assets of the bank for the security of the creditors generally, it being the only means of saving them from destruction, and from being wasted by being sold at ruinous sacrifices. The advice of counsel of high standing was again taken; and, on the 4th of September, 1841, a deed of assignment was made to Robertson, Newbold, Cope and Taylor, the intervenors herein; and on the 6th of the same month, a supplement thereto, by which instruments the corporation transferred and assigned all its property and assets of whatever description, not previously conveyed or pledged, for the purpose of paying its debts generally. A quantity of rail road, turnpike, bridge and canal stocks was excepted out of this conveyance, not worth more than one thousand dollars, if so much, with the avowed intention of preserving the existence of the corporation, which it seems from one of the resolutions passed in the meeting of the 8th of April, 1841, was considered of great importance by the stockholders. These assignments are also set forth.

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Assignment of the 4th of September, 1841.

This indenture, made the fourth day of September, in the year of our Lord one thousand eight hundred and forty-one, by and between the President, Directors and Company of the Bank of the United States of the one part, and James Robertson, of the city of Philadelphia and State of Pennsylvania, Esq.; Richard H. Bayard, of the city of Wilmington and State of Delaware, Esq.; James S. Newbold, Herman Cope and Thomas S. Taylor, all of the city of Philadelphia and State of Pennsylvania, Esqs. of the other part: Whereas, the party of the first part are indebted to sundry persons and bodies corporate, in divers sums of money, which from various causes the said party of the first part are unable at present fully to pay and satisfy, but are desirous of providing an adequate security for the payment and satisfaction of the same in a just and equitable manner—

Now, this indenture witnesseth, That the said party of the first part, as well for the consideration aforesaid, as for and in consideration of the sum of one dollar to them in hand paid by the party of the second part, at and before the sealing and delivery of these presents, the receipt whereof they do hereby acknowledge, have granted, bargained, sold, aliened, enfeoffed, released, confirmed, assigned, delivered, transferred and set over, and, by these presents, do grant, bargain, sell, alien, enfeoff, release, confirm, assign, deliver, transfer, and set over unto the said party of the second part, all and singular, the lands, tenements, hereditaments, stocks, goods, chattels, rights, credits, moneys, property and effects of the said party of the first part, whatsoever and wheresoever, saving and excepting only the estate, property and effects contained, described and set forth in a certain schedule hereunto annexed, sealed with the seal of the said party of the first part, and bearing even date herewith; and excepting also all the right, title, interest, property, claim and demand of the said party of the first part, whether present, resulting or eventual, of, in and to any and all the lands, tenements and hereditaments, goods, chattels, moneys, stocks, debts, effects and property whatsoever and wheresoever, heretofore granted, assigned, transferred, mortgaged, hypothecated, pledged or delivered by the said party of the first part, to any person or persons, or bodies corporate whatsoever, for the use, security or indemnity of any creditor or creditors, surety or sureties, or other persons or bodies corporate whatsoever, together with all deeds, papers, muniments of titles and evidences belonging or relating thereto. To have and to hold all and singular the premises hereby given, granted, assigned and transferred, or intended so to be, to the said party of the second part, and to the survivor of them, and the heirs, executors, administrators and assigns of such survivor, to and for

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their and his own use, benefit and behoof, forever, as joint tenants, and not as tenants in common. In trust, nevertheless, to and for the following uses, intents, purposes and trusts, and to and for none other whatsoever. That is to say, in trust in the first place, to enter upon the real estate hereby granted, and to sell, dispose of and convey the same in fee simple, or for any less estate, by public or private sale, for the best price that can be obtained for the same, for cash or on credit, as to them may seem most expedient, and to give receipts for the purchase money, so that the purchaser or purchasers shall not be accountable for the same; and in the meantime, and until sales shall be made, to receive the rents, issue and income of the said real estate, and pay the charges thereon; and to sell, dispose of, assign and transfer all the personal estate, property and effects hereby assigned, transferred and set over by the party of the first part to the party of the second part, for the best price that can be obtained for the same, for cash or on credit, as to them shall seem most expedient; and to receive in payment for the same, and in payment of the real estate so as aforesaid sold and conveyed, the notes of the party of the first part, if the said party of the second part shall deem it expedient so to do; and in the next place, in trust to ask, demand, sue for, recover, receive, collect and get in all and singular the debts and moneys due and owing to the said party of the first part and hereby assigned; and, at their discretion, to compromise and compound for the same; and the moneys so collected, received and got in, as well as the proceeds of the said real and personal estate, safely to keep and apply to and for the uses and purposes herein declared, that is to say,

In the first place, to pay and discharge all reasonable and necessary expenses, costs and charges attending the execution of this trust; in which it is expressly understood and agreed, that there shall be included to be charged by, and allowed to the said James Robertson, Richard H. Bayard, and James S. Newbold, the three assignees first above mentioned, so long as they shall respectively continue in the execution of this trust, the annual sum of fifteen hundred dollars each; and to be charged by, and allowed to the said Herman Cope and Thomas S. Taylor, the two assignees last above mentioned, respectively, so long as they shall respectively devote their whole time and attention to the business and concerns of this trust, so far as the same shall be requisite, the annual sum of four thousand dollars each, being an amount equal to the salaries which the said Herman Cope and Thomas S. Taylor respectively receive as superintendent of suspended debt, and cashier of the Bank of the United States, which salaries are now to cease and determine: Provided always, that if at any time hereafter, any creditor or creditors of the said party of the

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first part, interested in this trust to the amount together of five hundred thousand dollars or more, shall require the parties of the second part, to call a meeting of all the creditors so interested, for the purposes of diminishing, enlarging, or revoking such allowances to the assignees above mentioned, or any of them, that it shall then be the duty of the said party of the second part, to call such meeting, to be held at some convenient place, to be by them appointed, of which thirty days notice shall be published in two or more of the daily newspapers of the city of Philadelphia, at least twice a week during said period of thirty days; and at such meeting a majority in number and value of said creditors shall then and there have power to diminish, increase, or revoke the said allowance accordingly, and in case of such diminution or revocation, then the trust of this indenture in regard to such allowance, shall thereafter conform to such order of the creditors aforesaid, saving, nevertheless, in that event, to the parties of the second part, and each of them, their right to such compensation as a competent tribunal shall in this behalf hold them to be respectively entitled to for their services in the execution of this trust. And in the second place, to pay off, discharge, and satisfy all the judgments heretofore entered and obtained against the said party of the first part in any court or before any magistrate in the State of Pennsylvania, together with the interest, costs, and charges accruing thereon. And in the third place, fully and completely to indemnify, and save harmless, the legal representatives of the estate of Charles H. Phelps, deceased, from any loss or damage which the said estate has sustained, or may sustain, for or by reason of any suretyship, engagement or responsibility of any kind whatsoever, which the said Charles H. Phelps, or the legal representatives of his estate, may have entered into for, or on behalf of the party of the first part to these presents; and especially to make good, and carry into full effect to the said legal representatives, a certain agreement or engagement made to the said Charles H. Phelps, and contained in a letter addressed to him by Joseph Cowperthwait, Esq. acting on behalf of the party of the first part, together with Wm. D. Lewis, Esq., acting on behalf of the Girard Bank, and bearing date the seventh day of November, A. D. one thousand eight hundred and thirty-nine. And in the fourth place, fully to indemnify and save harmless, all other sureties from any loss or damage, which they or any of them have sustained or may sustain, for or by reason of any suretyship, engagement or responsibility of any kind whatsoever, which they respectively have entered into for, or on behalf of the said party of the first part to these presents. And in the fifth place, from time to time, as often as they shall have moneys in hand of sufficient amount for a dividend, to divide and distri-

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bute the same rateably and equally in and towards the payment of all and every the debts of the said party of the first part, and the interest accrued thereon, so that each creditor may participate rateably and alike in such dividend, until all the said debts and the interest accrued thereon shall be fully paid off and discharged; except post-notes issued to or held by certain banks in the city and county of Philadelphia, for which security was provided and given by an indenture bearing date the first day of May in the present year, and which are not intended to be provided for and embraced in the present indenture. And in further trust from and after the payment and discharge of the debts intended to be secured and provided for by this indenture, in full with interest, then to re-transfer convey and pay over to the said party of the first part, their successors and assigns, whatever may remain of the premises hereby granted or assigned, and all moneys, credits and effects which may have been raised therefrom, or from any part thereof, and not applied to the purposes of the trusts herein and hereby created; together with all deeds, papers, muniments of title, evidences and securities relating thereto. Provided always, nevertheless, and it is hereby expressly declared, understood and agreed, as the condition of this indenture and the trusts therein and thereby created, that before the said trustees, their successors or assigns, shall proceed to make or declare any dividend of the moneys raised or collected as aforesaid, they shall give thirty days notice of their intention so to do, in two or more of the daily newspapers published in the city of Philadelphia, at least twice a week during the said period of thirty days, calling upon the claimants to come forward and prove their debts; and such dividend shall be declared and made only on the amounts so brought forward and proved; and no creditor shall be entitled to claim or receive such dividend who shall not have brought forward and proved his, her or their debt or debts, before the time appointed for making and declaring such dividends. But, if any further dividends shall thereafter be made, such neglecting or defaulting creditor, bringing forward and proving his, her, or their claim or claims in time therefor as aforesaid, shall be entitled to receive, in addition to such dividend, an amount equal to the rate of dividend or dividends which shall have been before made and paid, and so on from time to time until a final dividend shall be declared and made; which final dividend the said trustees, their successors and assigns, are hereby authorized and required to declare and make, whenever the moneys arising from the premises hereby granted and assigned, shall by the payment of the said final dividend be disposed of and exhausted, or when all the creditors who have brought forward and proved their claims shall be paid in full, principal and interest; it being understood, how-

ever, that no interest shall be paid until the final dividend ; and from and after such final dividend, no creditor shall have any claim upon the remaining fund if any there be, nor upon the said trustees, their successors or assigns, for or by reason of these presents, or the trusts herein or hereby created ; but the same, except the trust for reconveying the surplus to the said party of the first part, their successors or assigns, shall from thenceforth cease, determine, and be at an end. Provided also, and it is expressly understood and agreed that if the said party of the first part, their successors or assigns, shall at any time pay off and discharge the said debts, then and from thenceforth the trusts herein and hereby created, or so much thereof as shall then remain unexecuted, shall cease and be determined ; and the whole of the trust property then remaining shall be conveyed, transferred and be delivered to the said party of the first part, their successors or assigns.—And it is hereby expressly agreed by and between the parties to these presents, as a condition and part thereof, that the said trustees, their successors and assigns, shall not be answerable for the acts, omissions, or defaults of each other, but only each for his own acts, omissions or defaults ; and that they shall not be answerable for the misconduct, omission, or default of any agent or agents they may find it necessary to employ ; but that they shall be accountable only for the exercise of fair and reasonable skill and judgment, as well in the appointment of such agent or agents, as in the general management of the trust hereby created, if the same be executed in good faith and intention.—And it is hereby further understood and agreed, that the compensation above agreed to be charged by and allowed to the parties of the second part for their services in executing this trust, shall be at the rate of fifteen hundred dollars per annum to each of the three assignees first above named, and at the rate of four thousand dollars per annum to each of the two assignees last above named, and that the said compensation shall be apportionable according to the time the said assignees shall respectively continue in the performance of the duties of the trusts hereby created : and the better to enable the said party of the second part, their successors and assigns, to execute the said trusts, the said party of the first part do hereby make, constitute and appoint them their true and lawful attorneys and attorney irrevocable in the premises, for them, and in their name, but to and for the uses, intents and purposes of this trust, and at the cost and charges of the same, to ask, demand, sue for, and recover and receive all and every sum or sums of money due or to become due by reason of any matter or thing herein and hereby granted and assigned, or intended so to be, and to give receipts and acquittances for the same ; and generally to act and do as fully and effectually in the premises, as

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they themselves might or could do; and substitute or substitutes one or more under them to nominate and appoint, and again at pleasure to revoke such nominations or appointments; hereby ratifying and confirming whatever they or their said substitute or substitutes may lawfully do in the premises.

In witness whereof, the said parties have hereunto interchangeably set their hands and seals, the said The President, Directors and Company of the Bank of the United States, party of the first part, acting by their president, James Robertson, Esq., at Philadelphia, the day and year first above written.

J. ROBERTSON, *President.* [L. s.]

We accept the trusts created by the above indenture of assignment.

J. ROBERTSON,	[L. s.]
JAMES S. NEWBOLD,	[L. s.]
HERMAN COPE,	[L. s.]
THOS. S. TAYLOR,	[L. s.]

Signed, sealed and delivered in the presence of us,

JNO. PENNINGTON,
G. W. FAIRMAN.

State of Pennsylvania, City of Philadelphia:

Before me, the subscriber, mayor of the city of Philadelphia, appeared the above named James Robertson, Esquire, to me personally known as the president of the corporation above named, The President, Directors and Company of the Bank of the United States, who being duly sworn according to law, did depose and say, that he executed the above written indenture, as president of the said corporation, and that the above impression is the common seal of the said corporation, thereto duly affixed by authority of the board of directors, and that the said indenture is sealed and delivered as the proper act and deed of the said The President, Directors and Company of the Bank of the United States, for the uses and purposes therein set forth. And John Pennington and George W. Fairman, the subscribing witnesses to the said indenture, being duly sworn, do declare, that they were present and did see the said president, James Robertson, Esquire, sign the said indenture, affix thereto the common seal of the said corporation, and deliver the said indenture as the act and deed of the said corporation.

Witness my hand, and the common seal of the said city, this fourth day of September, in the year of our Lord one thousand eight hundred and forty-one.

[L. s.]

JNO. SWIFT, *Mayor.*

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Supplement to the Assignment of the 4th of September, 1841.

This indenture, made the sixth day of September, in the year of our Lord one thousand eight hundred and forty-one, by and between the President, Directors and Company of the Bank of the United States, of the one part, and James Robertson, of the city of Philadelphia and State of Pennsylvania, Esquire; Richard H. Bayard, of the city of Wilmington and State of Delaware, Esquire; James S. Newbold, Herman Cope and Thomas S. Taylor, all of the said city of Philadelphia, Esquires, of the other part, witnesseth, that the said party of the first part, for divers good, sufficient and valuable considerations, them thereunto moving, and also for and in consideration of the sum of one dollar, to them in hand paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof they do hereby acknowledge, have granted, bargained, sold, aliened, enfeoffed, released, confirmed, assigned, transferred, delivered and set over, and by these presents do grant, bargain, sell, alien, enfeoff, release, confirm, assign, transfer, deliver and set over, unto the said party of the second part, all the right, title, interest, property, claims and demand of the said party of the first part, whether present, resulting or eventual, of, in and to any and all the lands, tenements, hereditaments, goods, chattels, moneys, stocks, debts, effects and property, whatsoever and wheresoever granted, mortgaged, assigned, transferred, hypothecated, pledged or delivered by the said party of the first part, to any person or persons, body or bodies corporate whatsoever, for the use, security, payment or indemnity of any creditor or creditors, surety or sureties, or other persons or bodies corporate whatsoever, prior to the 4th day of September, in the year of our Lord one thousand eight hundred and forty-one, saving and excepting only all the right, title, interest, property, claim and demand of the said party of the first part, whether present, resulting or eventual, of, in and to all the goods, chattels, moneys, stocks, debts, effects and property whatsoever, heretofore assigned, transferred, hypothecated, pledged or delivered by the said party of the first part, to any person or persons, or bodies corporate, whatsoever, for the use, security, payment or indemnity of any creditor or creditors, surety or sureties, or other persons or bodies corporate in Europe; together with all deeds, papers, muniments of title, and evidence relating thereto: To have and to hold, all and singular the premises hereby given, granted, assigned, transferred and set over, or intended so to be, to the said party of the second part, and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, to and for their and his own use, benefit and behoof forever. In trust, nevertheless, to and for the same uses, intents and purpo-

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ses, and upon the same trusts, and under and subject to the same terms, conditions, provisos, limitations, restrictions and qualifications, as are mentioned, set forth and declared, in and by a certain deed of assignment made and executed by and between the parties to these presents, bearing date the said fourth day of September, in the year of our Lord one thousand eight hundred and forty-one, and to which this deed of assignment is intended to be a supplement.

In witness whereof, the said parties have hereunto interchangeably set their hands and seals, the said The President, Directors and Company of the Bank of the United States, acting by their president, James Robertson, Esq., at Philadelphia, the day and year first above written.

J. ROBERTSON, *President.* [L. S.]

Signed, sealed and delivered }
 in the presence of us, }
 JNO. PENNINGTON,
 G. W. FAIRMAN.

We accept the trust created by the above indenture of assignment.

J. ROBERTSON, [L. S.]
 JAS. S. NEWBOLD, [L. S.]
 HERMAN COPE, [L. S.]
 THOS. S. TAYLOR, [L. S.]

Acknowledged before the mayor of the city of Philadelphia, on the 6th of Sept. 1841.

Recorded Sept. 7th, 1841, in the office for recording of deeds, &c., for the city and county of Philadelphia, in Deed Book G. S. No. 30, page 395, &c.

Mr. Bayard, one of the trustees named in these deeds, never accepted the trusts, and is no party to this suit. It is clearly shown, that at the term of the court which commenced in Philadelphia, on the 6th of September, 1841, it was expected that a number of judgments would be entered up against the bank, and it was to prevent the property and assets from being seized and sold under them, and those previously obtained, that these deeds were made. Mr. Jaudon, formerly cashier of the bank, testifies, that he considered, and so did others, that this assignment was general and final, and that the unavailable stocks retained were merely to save the charter.

The whole of the property transferred was delivered to the

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different assignees or trustees, before the attachment was taken out. As to that in this State, public notice was given through the newspapers of the transfer and assignment. Notices were personally served on many debtors, whose debts had been assigned; letters were sent through the post office to many others, who resided at a distance; and not one garnishee has denied having notice, so far as their answers have been examined. In truth, many urged the assignment, as a reason why judgments should not be rendered against them; and several were examined on the trial who admitted, without exception, that they were notified of the transfer to the intervenors, previous to being cited as garnishees. The fact of notice to the debtors of the transfer has been made out, so far as to induce a reasonable belief that it was generally given. It is further shown that, with the exception of a small number of notes, falling due in the course of the summer of 1841, all the evidences of debt in this State were in Pennsylvania when the assignments were made, and that they were actually delivered to the trustees, or their agent, Frazier. It is not denied that, the object of carrying the notes and other assets to Philadelphia, was, to prevent attachments being levied on them in this State; and that the purpose, among others, for selling the Merchants Bank in New Orleans, was, that "apprehensions were entertained, that the property might be attached by some of the creditors of the bank, as it was believed that the laws of Louisiana afforded greater facilities for such proceedings than those of other States."

At a meeting of the stockholders, held on the 3d of January, 1842, a very full statement of the administration of the affairs of the bank was presented to them by the president. In this, he informed them of the assignments and deeds made on the 7th of June, 1841, and on the 4th, and 6th of September in the same year, of the amount assigned, the names of the trustees, and finally the purposes and objects of the trusts. At this meeting Mr. Randall offered two resolutions, declaring that, in the judgment of the stockholders, the assignments made by the board of directors on the 7th of June, and the 4th of September, 1841, were executed in violation of the true intent and spirit of the acts of Assembly incorporating the bank, and the supplements

thereto, passed on the 4th, and 5th days of May, 1841, and that so far as they, (the stockholders,) have power to act in the premises and to assert their opinion, they do declare said assignments null and void. These resolutions were adopted, subject to the approval, or disapproval, of a meeting to be held on the third Monday of February following; or, in other words, they were postponed until that time. Resolutions were then offered by the same person who introduced those previously mentioned, declaring it expedient, for the bank to make a general assignment of all the real and personal estate, goods, chattels, rights and credits belonging to the corporation, to five persons, to secure the payment of the debts, agreeably to the acts of assembly of the 4th, and 5th of May, 1841, and that the stockholders should assemble on the third Monday of February following, to elect said five persons. These resolutions were adopted, and the board of directors requested to call a meeting on the day designated. On the 21st of February, 1842, the stockholders met; and after reading the proceedings of the previous meeting, a motion was made by the same Mr. Randall, to approve of them. This motion was decided not to be in order unless some amendment to them was offered; and, on an appeal taken from the decision of the chairman, it was sustained by a large majority. It was then announced, that the first business was the consideration of the resolutions postponed from the January meeting, to the one then assembled, and they were read. During the discussion of them, a substitute was offered, stating, that to quiet all doubts on the subject of all the assignments, it was best to direct the board of directors to take measures to have the validity of them submitted to the judicial tribunals of the State for their decision. Before any question was taken on this substitute, a motion was made to strike out the whole of it and of the original resolutions, and after the word *resolved*, to insert, "that the assignments made by the President and Directors of the Bank of the United States, on the 7th of June, and the 4th, and 6th of September, 1841, were made in pursuance of authority vested in them, were for the best interests of the bank, and are hereby ratified and confirmed by this meeting." After a long and violent discussion, this resolution was adopted by a vote of 205 to 109;

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the votes being given *per capita*, and not according to the scale adopted in voting for directors. Mr. Randall again presented his resolution, before mentioned, as adopted, that it was expedient to make a general assignment, agreeably to the acts of the 4th, and 5th of May, 1841; during the discussion of which, the meeting adjourned, without coming to a conclusion.

The evidence shows, that this meeting of the stockholders was very large, tumultuous and disorderly; that no questions were asked how much stock was held by each individual, how many votes he had according to the charter, or whether he voted as a stockholder or proxy. The voting was *per capita*, as was the case in previous meetings of the kind. The minority of the stockholders subsequently assembled at some other place, and it is said protested against the proceedings of the majority; but for what particular reasons, or how much stock they represented, the record does not inform us. Since that period, no proceedings have been had by the stockholders in relation to these assignments.

The judge below gave a judgment in favor of the intervenors, declaring the assignments legal and valid, and that the property and funds attached belonged to them; at the same time, he declared that, as the assignment was general and the corporation insolvent, the United States, under the acts of Congress, had a preference and priority upon every thing in the hands of the assignees; and he decreed that the judgment in their favor should be paid in full. From this part of the judgment the assignees have appealed; and the United States have prayed that the judgment may be amended, so as to declare all the assignments null and void.

Peyton, District Attorney, and *I. W. Smith*, for the plaintiffs. This cause presents two questions. One, whether the attachment of the plaintiffs should prevail as to the property attached, over the assignments made by the bank for the benefit of its creditors. The other, whether the right of priority given by the act of Congress to the United States for the payment of debts, exists as to the property attached.

In considering the validity of the deeds as to the attachment, the first inquiry is, whether they are valid by the laws of the state where they were made; for, if not valid there, they cannot be valid elsewhere. The next is, whether, considering them valid by the laws of Pennsylvania, they should not also be tested

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by the laws of Louisiana. We maintain, that the deeds are invalid according to the law of Pennsylvania, on three grounds: first, because they were executed by the president of the bank, without authority; secondly, because they are fraudulent for matter apparent on their face; and thirdly, because they are fraudulent for matter *dehors* the instruments.

I. *The trusts of the 7th June and 4th September are invalid for want of power on the part of the president to execute them.*

It is unnecessary to inquire what would be the power of the president and board of directors by the common law, as it is believed that the acts of the Legislature of the 4th and 5th May, control the subject. If such an inquiry were necessary, it is believed that it would result in the conclusion to which Judge Story arrived in the case of *Beaston v. Farmers Bank of Delaware*, 12 Peters, 138. "I must say, that independent of some *special and positive law* or provision in its charter to such an effect, I do exceedingly doubt if any corporation, at least without the express assent of all the corporators, can rightfully dispose of all its property by such a general assignment, so as to render itself incapable in future of performing any of its corporate functions." It may be well to look at the situation of the bank at the time the acts of May were passed. The state of the bank at that time was the evil, and the acts were intended to be the remedy. The bank had resumed specie payments about four months previously, and the resumption continued a few days only, when the final suspension took place. Its insolvency was notorious. Even the stockholders were compelled to admit it.

The great question was, how should the bank be liquidated. There was no insolvent law for corporations. In devising expedients to protect their own interest, the stockholders and directors had been led to the subject of voluntary assignments. By the act of 1836 it was necessary to furnish bond and security in double the amount of the appraised value of the estate assigned. See Purdon's Digest, 82. This could not be furnished. At a meeting of the stockholders on the 4th May, 1841, the president reported, that a committee of directors had succeeded in accomplishing the wishes of the stockholders so far as concerned the post-notes in the hands of the Philadelphia banks, "but for want of legislative action to grant power for creating the trust without the securities *now required by law*, they had not yet succeeded in complying with the wishes of the stockholders in reference to the *circulation and deposits*." For this reason they had applied to the Legislature for relief. The acts of the 4th and 5th May were passed. By these laws, the legislature intended to supply the *hiatus* which existed in their legislation, by providing an insolvent law for the bank. The stockholders regarded

these laws as controlling the assignments which the bank might make.

No general assignment could be made by the bank after the passage of these laws, without following their requirements. They were duly accepted by the bank before the second assignment was executed. From that period, they pointed out a particular course to be pursued, and that course precluded any other from being adopted. This view of the law is fortified by reference to an act of the Legislature of Pennsylvania, of the 21st of March, 1806, quoted in Purdon's Digest, 51, as follows:

"Sect. 13. *In all cases where a remedy is provided or duty enjoined, or anything directed to be done by any act or acts of Assembly of this commonwealth, the directions of the said act shall be strictly pursued, and no penalty shall be inflicted or any thing done, agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such act or acts into effect.*"

By the acts of May, 1841, we infer, that before any general assignment could be made by the president and board of directors, it was required: First; that there should previously be a general meeting of the stockholders, held in pursuance of the charter. Second; that the stockholders should elect five trustees, and prescribe their powers and duties. Third; that the votes should be according to the scale allowed at the election of directors. Fourth; that it should be the duty of the president and board to conform to the votes of the stockholders.

The next inquiry is, whether any such proceedings on the part of the stockholders have taken place.

The first resolution which may be supposed to refer to the assignment afterwards made, was passed at the meeting of the 4th May, 1841. That resolution, offered by Josiah Randall, Esq. and passed by the stockholders, is as follows:

"Resolved, That the board of directors be directed forthwith to pledge funds to protect the circulation of, and the deposits in the bank."

On the 18th of the same month, on motion of Mr. Randall, they

"Resolved, That the board of directors be and they are hereby authorized to exercise their own discretion as to the expediency, as well as to the time and manner of carrying into effect the resolution adopted at the last meeting, for pledging certain assets in trust, for the payment of the circulation of, and deposits in the bank."

Nothing is said in these resolutions of the notes of the bank chartered by Congress, nor of the post-notes of the bank. Yet we find in the deed of 7th June, that there are four classes of debts:

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First, deposits ; second, the notes of the bank chartered by Congress ; third, the notes used in circulation, or demand notes ; and fourth, the post-notes.

On the 3d January, 1842, at the annual meeting of the stockholders, on motion of Mr. Randall, they adopted the following resolutions.

"Resolved, That in the judgment of this meeting, the assignment by the board of directors of the Bank of the United States, dated the 7th day of June, and the 4th day of September, 1841, were executed *in violation of the true intent and spirit of the acts of Assembly incorporating the bank, and the supplements thereto, passed the 4th and 5th day of May last.*

"Resolved, So far as the stockholders have the power to act in the premises, and to assert their opinion, they do hereby declare, that the said assignments are utterly null and void : subject to the approval or disapproval of the meeting to be held on the third Monday in February next.

"Resolved, That it is expedient for the Bank of the United States to make a general assignment of the real and personal estate, goods, chattels, rights and credits, whatsoever and wheresoever, of the said corporation, to five persons, for the payment or securing the debts of the same, agreeably to the provisions of the acts of Assembly of this commonwealth, passed the 4th and 5th days of May, 1841.

"Resolved, That the stockholders of this bank will adjourn to meet the third Monday in February next, at 10 o'clock, A. M., at the banking-house, to elect five persons as trustees, for the purpose stated in the last resolution." And on motion of Mr. Kennedy:

"Resolved, That a committee of three stockholders be appointed to report to the adjourned meeting on the third Monday in February, how the assignment of the property of the bank may be made, so as to give no undue advantage to the judgment creditors."

Seventeen days after this meeting, and thirty-one days before the next meeting was to be held, the United States levied their attachment in this case ; and within a few days afterwards, other attachments were issued against the bank.

On the third Monday in February the meeting was called to order, and the chairman stated, that Mr. Randall's resolutions were the first business before it. Previous to putting the question, a motion was made that the votes should be taken according to the scale prescribed in the charter, and not *per capita*, but this was lost. No inquiry was made as to the qualification of the voter, the number of shares he held, or whether he appeared to represent himself or as a proxy for another. The proceed-

ings of the meeting were tumultuous and disorderly. Earnest efforts were made by many of the largest stockholders to have the qualifications of the persons inquired into. These efforts were successfully resisted by the chairman and a majority of the persons present.

An amendment was offered, declaring that the assignments of June and September were made in pursuance of authority vested in the president and directors, and were for the best interests of the bank; and they were ratified and confirmed by that meeting. On putting the question, it was difficult to decide, but on a division there were 204 ayes and 109 nays. So the amendment was adopted. A resolution to propose a general assignment was then offered, but it was defeated by a motion to adjourn—ayes 178, and nays 119. These are all the proceedings of the stockholders on the subject of the second and third assignments.

It might be well doubted, if the president and directors had not so far exceeded the expressed wishes of the stockholders, as to prevent the June trust from deriving any support from their proceedings. In regard to the third deed, the stockholders were not consulted. The only meeting of the stockholders prior to the levying of the attachment in this case, repudiated the second, third and fourth deeds. The proceedings of the last meeting were of such a nature as to be entitled to little consideration, even had they occurred prior to the attachments of the United States. Having taken place subsequently, they could not divest the plaintiffs of the rights which they had acquired in the meantime by the attachment. At all events, it must be admitted, that none of these proceedings confer on the president and directors the authority which the acts of May require should be conferred by the stockholders to execute a general assignment.

II. The deeds under which the intervenors claim, are to be construed together with that of the 6th of September, and form a general assignment of all the property of the bank.

It is first necessary to inquire, what is the nature of a general assignment, and whether it does not preserve its proper character, though executed by one or several deeds, and though on their face each deed bears the outward form of a partial assignment. The correct rule appears to be, that no matter how many instruments are employed to effect the same result, they all partake of the same character, and all should be considered as parts of the same whole. If the same causes which led to the execution of one of the instruments, partial when considered alone, continue to operate until every particle of the debtor's property is divested, the first instrument is to be coupled with those that follow, and the whole should be construed together.

This question was presented to the Supreme Court of Penn-

sylvania, in the case of *Downing v. Kintzing*, (2 Serg. & Rawle, 335,) in relation to two assignments made to different persons by an insolvent debtor, at an interval of thirty-one days between them; and it was contended, that the two deeds were to be construed each by itself. But the court said, through Chief Justice Tilghman: "Now here has been a voluntary assignment of the whole estate for the benefit of creditors, and the only objection is, that it was not *done at one time*. The counsel for the plaintiff concede that assignments of the whole to several persons, by several deeds at the same time, would be within the law," (which was the act of Congress giving priority to the United States,) "and I can perceive no substantial distinction between that and the case before us. When the first assignment was made, it was in contemplation to assign the whole residue, which was done in thirty-one days afterwards. The law cannot be evaded by contrivance." That view of the law was enforced by a reference to the decided cases.

As to the property conveyed, it must be all which belongs to the debtor at the time of the conveyance. But if a *trifling portion* of the estate be reserved, and especially if that be done *with a view to evade the law*, such a reservation does not make the assignment a partial one. Thus in the cause of the *United States v. Hooe*, (3 Cranch, 91,) Chief Justice Marshall, in defining the word "property," under the priority act of 1799, says, that "if a trivial portion of an estate should be left out *for the purpose of evading* the act, it would be considered as *a fraud upon the law*, and the parties would not be enabled to *avail themselves of such a contrivance*."

Whether we regard the causes which induced the execution of the second and third deeds, or the results which were to be attained through their means—whether we look at the affairs of the bank in June or September, we are forced to consider, that the causes which, in the opinion of the directors, rendered one of them necessary, must have equally operated to render the other necessary. The benefits to be obtained, and the evils to be averted were the same in both. The situation of the bank had not changed from the 7th of June to the 4th of September, excepting in that natural and necessary increase of embarrassments from causes which existed on the 7th June, and continued to operate until the 4th of September. The execution of the second deed rendered the third a necessary consequence. Though they differ in the interval of time, yet in reality, the third deed is as much a sequel and supplement to the second, as the fourth is a sequel and supplement to the third. These show evidence of a common intention and design, which was, to reap all the advantages of the

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law for a general assignment, without bearing any of the burdens it imposed.

The reservation of a trivial portion of the assets to evade the law, by the deed of September, shows the secret design that had been acted on in the deed of June, and which had continued up to that moment.

By the deed of the 7th June, no property was conveyed but what was included in the schedules annexed to the deed. By the deed of the 4th of September, all the property of the bank was assigned, excepting only the property contained in a schedule annexed to the deed, and the residuary interest of the bank in the property which had been previously pledged or assigned in trust. This last reservation included the stocks pledged in Europe and the assets assigned in May and June. By the deed of the 6th September, the residuary interest of the bank in the assets assigned in May and June was also assigned. So there remained after the last deed, only the stocks in the schedule of the third deed, and the stocks pledged in Europe.

The testimony adduced, shows the nature and value of the property excepted, and the motive for the exception. Mr. S. Jaudon, who had been at first the cashier of the bank, and afterwards its agent, and who cannot be supposed to have any bias *against* the bank, testifies, "that it was the intention of said bank, in making said third trust, to assign to said trustees *all the property*, rights and credits of said bank, *which were of any value*, and which had not been assigned in the other trusts. The exception of the property and effects mentioned in the schedule annexed thereto, consisted of stocks which had *only a nominal value*, and were reserved for the express purpose of preventing the corporation from becoming extinct. The intention of said bank in making said last assignment was certainly to make a general assignment of all its property, and the witness urged upon the president the necessity of making such an assignment, and it was agreed that such an assignment should be made. There had been a great many judgments obtained against the said bank before the last deed was made. The second trust was made with this view—that the bill holders and depositors would be so well satisfied with the securities assigned for their protection, that no suit would be brought by any of them against the bank, and that the bank could then continue to manage the business without molestation. As to all the other creditors, it was thought the bank could make satisfactory arrangements with them. But, instead of these views being carried out, the various creditors proceeded, notwithstanding the second trust, to recover judgment against the bank, and to seize other property; so that a general assignment, to include every thing that was liable to

seizure became necessary:—and the third trust was made to *prevent the payment of those creditors who might get judgment against the bank and sell the property of the bank to satisfy them*; and with the view of throwing *all the property* of the bank into a *common fund*, for the common benefit of all the creditors.”

We admit, that under the law of Pennsylvania, an assignment by the debtor of his property to a trustee to pay his debts is valid; that such a deed may contain preferences; and that it is not avoided by the actual insolvency of the debtor; and that the debtor may appoint his own trustee. We believe it to be the established law of that State, that no one, or even all of these ingredients, is condemned by itself, but that the deed is to stand or fall according as these clauses are considered innocent or fraudulent from the other provisions of the deed, and the circumstances under which the deed was made.

While this right of giving preferences, and even of appointing a trustee, is recognized, the greatest jealousy is manifested in the construction of such deeds in case the grantor is in an insolvent condition. See *Burd v. Smith*, 4 Dallas, 79. *Wilt v. Franklin*, 1 Binney, 526.

One of the rules applied by the courts to voluntary assignments is, that fraud in any part of the deed vitiates the whole. It makes no difference whether the fraud be a moral, or merely a legal fraud. In the case of *MCclurg v. Leckey*, 3 Pennsylvania Reports, 94, the Supreme Court say: “When the assignment is tainted with either moral or legal fraud, the property does not pass, but remains in the debtor, liable to the execution of those creditors who have not assented to the assignment.

In the case of *Thomas v. Jenks*, 5 Rawle's Reports, 225, the Supreme Court of Pennsylvania say, that nothing is clearer than that a contract fraudulent in part by the provisions of a statute, whatever be the abstract effect of fraud in other cases, is void in the whole. The principle has since been applied in *Hyslop v. Clark*, 14 Johnson's Rep. 465, to the very case of assignment in trust for the payment of debts.

In the case of *Irvin v. Kean*, 3 Wharton's Rep. 355, the Supreme Court of Pennsylvania say: “When the assignment is affected, either with moral or legal fraud, the property does not pass; it remains in the debtor, liable to the execution of creditors.” The case of *MCclurg v. Leckey*, is referred to and affirmed.*

III. *The second and third deeds are void for the uncertainties on their face, as to the cestuis que trust, and the amounts due to them; and for want of specific provisions for the final settlement of the trust.*

In making an assignment for the benefit of creditors, the insolvent is bound to give such information to the creditors, as will enable them to know how far their interests are to be affected by the deed; whether they should accept of its conditions; or whether they should repudiate it, and look to other remedies. He is bound to insert their names, or give such other reference to them as renders it possible to ascertain who they are. It is no answer to say, that it was impossible to furnish the names of the creditors of the bank. If it is impossible, from the nature of the business, to furnish that information, it shows the impropriety of resorting to the assignments.

Before the deeds can be sustained by the court, it must appear that they are free from fraud. The omissions in a deed of trust are often as fatal to the deed as the clauses expressly inserted. See the case of *Burd v. Smith*, before referred to.

IV. *The second and third trusts are void by reason of the clause excluding all creditors, who should not make proof of their debts within thirty days after advertisement in the Philadelphia newspapers, and giving the surplus to the bank.*

There is some conflict in the decisions, on the subject of conditions attached by the debtor to his assignment; but the better opinion appears to be, that any condition not introduced for the benefit of the creditors, but intended to operate either directly or indirectly for the benefit of the debtor, is null, and avoids the deed.

The general rule is no where better stated than by Senator Tracy, in the case of *Grover v. Wakeman*, 11 Wendell's Rep. 222. "The only safe rule," he says, "is to regard every assignment which operates to delay creditors for any purpose whatever, not distinctly calculated to promote their interest, as contrary to the policy of the statute of frauds." See also *Austin v. Bell*, 20 Johnson's Rep. 442, and *Graves v. Roy*, 13 La. Rep. 457. *Lippincott v. Barker*, 2 Binney's Rep. 190.

The second and third deed, each contains the following condition: "and provided always, nevertheless, and it is hereby expressly declared, understood and agreed, as the *condition* of this indenture, and of the trust therein and thereby created, that before the said trustees, their successors or assigns, shall proceed to make or declare any dividend of the moneys raised or collected as aforesaid, they shall give *thirty days notice* of their intention to do so, in two or more daily newspapers of the city of Philadelphia, at least twice a week, during the same period of thirty days, calling upon the claimants to come forward and *prove their debts*: and such dividends shall be declared and made, *only on the amounts so brought forward and proved*; and no creditor shall

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be entitled to claim or receive such dividend, who shall not have brought forward and proved his debt, before the time appointed for making and declaring the dividend. But, if any dividend or dividends, shall thereafter be made, such neglecting or defaulting creditor or creditors, bringing forward and proving his or their claim, or claims, in time therefor, as aforesaid, shall be entitled to receive in addition to such dividend, an amount equal to the rate of dividend or dividends, which shall have been before made and paid; and so on, from time to time, until a final dividend shall be declared and made, which final dividend, the said trustees, their successors and assigns, are hereby authorized and required to declare and make, whenever moneys arising from the premises hereby granted and assigned, shall by the payment of the said final dividend be disposed of and exhausted, or when all the creditors who have brought forward and proved their claims, be paid in full, principal and interest; it being understood, however, that no interest shall be paid until the final dividend; and from and after such final dividend, no creditor shall have any claim upon the remaining fund, if any there be, nor upon the said trustees, their successors or assigns, for or by reason of these presents, or of the trusts herein and hereby created; but the same, except the trusts for reconveying the surplus to the said party of the first part, their successor or assigns shall henceforth cease, and be determined and at an end."

By this proviso, it appears, that whenever the assignees choose to advertise in two daily papers in Philadelphia, all the creditors who do not come forward and prove their claims, within the period, cannot share in the dividend, and are not to be considered as creditors of the bank. Should they prove their claims before the final dividend, they are placed on an equality with such creditors as have duly proved their claims. But those who, from absence, sickness, distance, or any other cause, do not "come forward" and prove their debts, before the final dividend is declared, have no recourse on the surplus.

If, as it will probably be contended, the board of directors, when the June trust was made, expected to be able to pay the debts provided for in trust—then they calculated on a surplus to accrue to the bank from that trust. If their object was to make the deed for the benefit of the creditors, they would have declared that the balance remaining after the final dividend, should be applied to pay the remaining creditors of the classes specified in the deed, and who had failed to comply with the condition of "coming forward" and making the proof, as required by the deed.

If the board of directors had desired to hinder and delay the creditors in the prosecution of their legal remedies by compelling them to accept such terms as it was thought best to offer, would

not the board have inserted this very clause? Its effect is to dictate terms to the creditors, and was introduced with a view to enforce the acceptance of the trust. If such is the just construction of the clause, then it clearly was made with intent to defraud, hinder and delay the creditors.

This clause is objectionable in another point of view. It leaves the time to be employed in winding up the affairs of the bank entirely to the discretion of the trustees.

The clear intention of the bank, in introducing this clause, was to place the trustees beyond the control of the courts as to the time allowed for settlement of the trust.

It is easy to perceive what would be the fate of the trusts containing these clauses in the courts of the State of New York. In the case of *Wakeman v. Grover*, 3 Paige's Chancery Rep. 40, the Chancellor, in deciding the cause, says: "There are however two other provisions in this assignment, which render it *still more objectionable* than the simple clause excluding those creditors who should not come in within a limited time, and give their debtors a general discharge.

"In the first place, no time is limited within which the creditors of the second class are to come in to entitle themselves to a share of the surplus; but each is to come in *within three months* after the assignees may think proper to give them a written notice to accept or decline the offer held out to them by the assignment.

"Again; the question is not, whether there is not a remedy for the creditors, but whether the debtor has not deprived them of any remedy for the recovery of their debts, unless they resort to a court of equity, to counteract the illegal effect of the arrangement which has been made. In the case of *Pierpont & Lord v. Graham*, Judge Washington admits that if no time is fixed by the assignment within which the creditors may come in, or a very distant period named, the assignment must be considered as fraudulent. And certainly, it cannot be better, when it is left entirely in the power of debtors or trustees of their own choosing, *to fix that time for themselves, without the consent of the creditors.*"

In *Hyslop v. Clark*, 14 Johnson's Rep. 446, the Supreme Court say: "An insolvent debtor has no right to place his property in such a situation, as to prevent his creditors from taking it under the process of a court of law and to drive them into a court of equity, where they must encounter great expense and delay, *unless it be under very special circumstances*, and for the purpose of honestly giving a preference to some of his creditors, or to cause a just distribution of his estate to be made amongst them."

V. Besides the objections common to the second deed, the third

is liable to others, apparent on its face, viz. : to the want of schedules of the property assigned ; the power to compromise conferred on the trustees, and the option permitted to them to receive or not the notes of the bank in payment of its property sold.

The absence of any schedule of the property assigned is evidence of fraud.

In *Pierpont v. Graham*, 4 Washington, C. C. Rep. 237, Judge Washington held, that "as to the want of a schedule, it may be admitted, that an assignment of all the debtor's effects, without a specification of property, is generally speaking, an *indicium* of fraud, but nothing more. In Twine's case, it was an item in the list of circumstances to establish the fraudulent intent."

In the case of *Van Nest v. Yoe*, decided in April, 1843, (1 Sand. Ch. Rep. 4, 7,) Assistant Vice-Chancellor Sandford says—"The next objection to the assignment is the absence of an inventory of the property and effects assigned. This is not of itself a strong badge of fraud, but frequently becomes one in connexion with other circumstances."

The trust of the 4th September, contains a general description of the different classes of creditors, but there are no words tending in the least to describe or point out the property intended to be assigned. It remains to this day a secret to the creditors of the bank, what property was included. Under such circumstances, how is it possible for the creditors ever to enforce the execution of the trust?

It is quite true, that there are decisions which declare that the absence of schedules when properly explained affords no presumption of fraud. But they refer to cases where every thing else was fair and equitable, and where the property was on the face of the deed, all devoted to creditors. Considered, *per se*, the absence of the schedules, though an *indicium* of fraud, would not be conclusive ; and if the presumption were repelled by every thing apparent on the deed, and by every thing proved *aliunde*, the deed would unquestionably be sustained. But, when considered in connexion with the other objectionable clauses of this deed, the absence of the schedules of the property is of great importance. It is no longer an isolated fact, but in connexion with other facts, goes far to furnish a clear and cogent presumption that the deed of the 4th of September was made with the intent to hinder, defraud and delay the creditors of the bank.

In fact, there was no excuse for not annexing schedules of the property as had been done in making the previous trusts. The bank possessed the means of making those schedules, for at the next annual meeting of the stockholders, the president of the bank, and at the same time, principal trustee, laid before the stockholders "a statement of the assets of the bank, containing

an account of all the property passed under the several assignments and other assets." If the stockholders were entitled to that information, were not the creditors? If those who had a residuary interest only in the property assigned, had the right to know what that property was, and where it was situated, had not the creditors, in whom the directors attempted to vest the present interest in the property, a much stronger right?

The power to compromise for the debts, and the power to receive the notes of the bank in payment of the property sold, is illegal. The deed authorizes the trustees to sell all the real estate, and then all the personal estate; "and to receive in payment for the same, and in payment for the real estate, so as aforesaid sold and conveyed, *the notes of the party of the first part, if the said party of the second part shall deem it expedient so to do*: and in the next place, in trust to ask, demand, sue for, recover, receive, collect and get in all and singular the debts and moneys due and owing to the said party of the first part, and hereby assigned; and *at their discretion, to compromise and compound the same.*"

A fair criterion to test the legality of the clauses in question is, whether, if either the bank or the trustees were to make any future preferences, could it be done, under the provisions of the deed, in such a manner that either the creditors could have no means of ascertaining the facts, or if the facts were ascertained, could the trustees be held responsible for their acts, under the wide range of power conferred on them by the deed? Let us look at the practical operation of the clauses of the deed, and see whether they will bear the test.

The trustees appointed by the bank, take possession of the estate. No schedule is made out, nor can any one ascertain of what the property consists, or where it is situated. They wish to favor the creditor. They may give him any property of the bank they think proper, or they may transfer to him any of the debts due to the bank. If he be a debtor to the bank, they may allow him to pay in the notes of the bank, or they may refuse it. They may require payment in full, or they may give him a discharge for one cent in the dollar. With such clauses of the deed, their power is practically limited only by their own will.

VI. *The deeds are void for want of acceptance by the creditors.*

Assignments are of two classes; those where the acceptance of the creditors is presumed, and those where the acceptance of the creditors is not presumed, and where, until acceptance, the deed is inchoate, and insufficient to defeat an attachment.

The rule appears to be, that where the deed is such as to be clearly for the interest of the creditors, the law presumes their as-

sent. On the other hand, where a question as to their interest may arise, so that the discretion of the creditors may be exercised, the law requires the deed to be completed by the acts of the parties.

The rule is well laid down in *Jewett v. Barnard*, 6 Maine Rep. 383. The court say; "It is true, that deeds of trust where made for the undoubted benefit of persons who are absent, have been considered as vesting the legal estate in the trustee, without any expression of the assent of the person for whose benefit such deeds are made. The assent of the *cestui que trust* has been presumed, inasmuch as the conveyance was made entirely for his benefit."

This court has maintained the same doctrine in the late case of *Fellows v. The Vicksburg Rail-Road and Banking Company*, 6 Rob. 246. "It appears also to be settled, that the assent of creditors will be presumed in the case of an assignment to a trustee for the benefit of *all* the creditors, when no release or other condition is stipulated for, or on behalf of the debtor, but the property is to be distributed among all the creditors *pro rata*. This assent is said to be *inferred upon the general* principles of law, *because the trust* must be for their benefit and cannot be for their injury." See also 2 Kent's Com. 552-3.

Is this such a deed as to authorize the court to presume its acceptance by the creditors? It contains several provisions which are wholly irreconcilable with the idea of a presumed acceptance. At the time of the execution of these deeds, the bank had a vast amount of property scattered over the different states of the Union. Its creditors also, resided in all parts of this country and in Europe. Is it to be supposed that those creditors would agree to abstain from legal proceedings against the property of a bank, which in many cases could be found at the places of their residence, and agree that all the assets should remain in the hands of the officers of the bank under the name of trustees, and that they should be shut out from any dividend, unless they should within thirty days after the first publication in any two of the daily newspapers of the city of Philadelphia, proceed to that city or wherever else the trustees should think proper to be, and adduce proof of their claims?

The trustees have been receiving the notes and obligations of the bank, in payment of debts due it—and they say they are bound to do so under the law of the 4th May, above quoted. So they consider this law as in effect forming a part of the assignment. What is the operation of this law upon the interest of the *cestui que trusts* of the June deed? It improves the market value of the circulation, deposits and post-notes, because debtors of the bank can use them in payment of debts to the bank. The hol-

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der of these obligations who has already lost fifty per cent by their depreciation, inquires of himself—"Shall I accept this trust? If I do, I have to wait until all the solvent debtors to the bank have purchased its obligations to pay their debts to the bank, and then unless these exceed \$5,000,000, not a dollar in specie will have been received to furnish a dividend on the debt due to me. At the same time, the best debtors to the bank are discharged and the most valuable property of the bank is in effect taken to pay debts at par, while I am unable to obtain any thing on mine. But, instead of accepting this deed, I can refuse its provisions and resort to legal remedies, or I can sell the obligations of the bank held by me to the debtors of the bank to pay debts." He would not accept the provisions of the trust.

The clause of the September trust above quoted, authorizes the trustees, if they think proper, to receive the notes of the bank in payment of property sold. Let us examine the effect of that clause, taken in connexion with the law above quoted, upon the different classes of creditors, under the September trust.

The first class in the September trust, after the payment of the expenses of the trust, is the judgment creditors. This clause is injurious to their interest, because it enables the holders of the notes of the bank to obtain more than their value, by selling them to the purchasers of the property of the bank to be used by them to pay the price of property bought, or by selling them to the debtors of the bank to pay their debts. This clause places the holder of the bank notes on better ground than the judgment creditor of the bank. The bank notes are available to sell to purchasers of property and to the debtors of the bank, while his judgment debt cannot be used for either of these purposes. As many of the judgments were obtained upon bank notes, the judgment creditor finds himself in a worse situation by having his debt on the notes merged in the judgment. Thus, while the note holder receives more than the real value of the notes he holds, without a compliance with any of the conditions of the deed, the judgment creditor sees himself compelled to wait until all the "evidences of debt issued or created by said bank" shall be taken up. For, until that event shall take place, it is uncertain if any money will be received by the trustees, further than may be necessary to defray expenses and pay their own salaries; and consequently, no payments can be made by them. Can it be supposed the judgment creditor would assent to such a deed, when if it were out of his way, he could issue an execution, and seize and sell sufficient property to satisfy his judgment? Is his interest so clear, that the law would presume his acceptance of the deed as being clearly for his further benefit?

If then, the creditors under the September trust who, are the

most highly favored, might well hesitate before accepting the deed—is it necessary to pursue the inquiry?

If we look at the next class of favored creditors, we perceive that they are the sureties of the bank, and the testimony shows, that to a great extent they are the judicial sureties. They, by summary proceedings, are entitled to judgment against the bank, and they may thus place themselves in the same position occupied by the judgment creditors. The interest then of the sureties is adverse to the trusts.

The other creditors form the remaining class. While the holders of the obligations covered by the June trust, have it in their power to obtain more than the real value of those obligations, the remaining creditors would be postponed until all the other demands against the bank are satisfied or its property exhausted. Surely, they would not accept deeds which if carried out, would probably exhaust the property of their insolvent debtor, and thus deprive them of the smallest share in its proceeds.

But if the doctrine of presumed assent be admitted to its fullest extent, presumption of acceptance may be rebutted by the evidence, that the *cestui que trusts* have disclaimed the advantages offered by the deed; and the court will be bound to set aside the deed made for persons who refuse to accept its provisions. See the case of *Brooks v. Marbury*, 11 Wheaton, 96.

If the proof discloses the fact that the *cestui que trusts* have refused to avail themselves of each deed, then the court will not sustain them. The trust of June purports, on its face, to have been made to redeem the circulation, the deposits and post-notes. Mr. Jaudon, the former cashier, states, that the second trust was made with this view—that the bill holders and depositors would be so well satisfied with the securities assigned for their protection, that no suits would be brought by any of them against the bank.

Thus, the *cestui que trusts* were called on, by that deed, to say if they considered it a deed for their benefit, or whether it was a deed made to hinder, obstruct and delay them. Their answer is too explicit to be misunderstood. It is found in the testimony of Mr. Jaudon. "Instead of these views being carried out, the various creditors proceeded to recover judgments against the bank." Their answer is also found in the great number of judgments obtained against the bank before the third deed was executed. More than forty of those judgments were paid before the United States interfered in Pennsylvania, with the view of subjecting all the assets to their right of priority and preference. The record does not disclose how many judgments were obtained in the interval. That they were very numerous, there cannot be the slightest doubt. That they were for large amounts, and were most vigorously prosecuted, is evidenced by the sweeping nature

of the third assignment, embracing in its terms, *all* the property of the bank, excepting the turnpike road and other stocks of a nominal value. To defeat the judgments already obtained, and to evade the judgments to be obtained on the first Monday of September, the directors, on the 2d of September, arranged the details, and on the 4th of September carried them into execution. Can proof be clearer, than that the *cestui que trusts* of the deed of June have refused to accept it? If they had accepted it, the September trust would, perhaps, never have been required.

The creditors having refused to accept the provisions of that deed, is there any well founded reason why the court should permit the assets of the bank to remain in the hands of its agents, locked up from its creditors?

If the trust of September be subjected to the same test, it will be found to warrant the same conclusion. The judgments that have been had since that time evidence, that the creditors, for whose benefit it purports to be made, refuse its proffered advantages, and prefer to rely on their legal remedies. The amount of the judgments against the bank in this State, since the September trust, and in evidence in this case, is about \$400,000; what the amount is elsewhere the record does not inform us.

If we look at the proceedings of the trustees under both trusts, they afford conclusive proof that the creditors have only regarded their interest in refusing the trusts professedly made for their benefit.

VII. *The trusts are void, because made with the intent to prevent the sacrifice of the property of the bank, and otherwise defraud and delay the creditors.*

The law regards with great distrust any attempt on the part of the debtor, to obstruct the remedies of the creditor. If by voluntary assignments or any other contrivance he seek to preserve his property until better times—if he seek to avoid the sacrifice of sheriffs' sales and to withdraw it from legal process, in order to sell it afterwards at higher prices, he violates the spirit of the law and seeks to hinder and delay his creditors.

In the case of *Van Nest v. Yoe* above cited, the court say: "The law provides, that the debtor shall fulfil his obligations, and on his default, it gives to the creditor 'his lawful suit,' for the recovery of his demand, and the sale of the property of the debtor for its payment. This is a strict right. And the debtor, who believing himself more than solvent, places his property beyond the reach of the process of the law, whatever may be the pretence under which he cloaks the act, in the language of the statute of frauds, 'hinders' and 'delays' and ultimately 'defrauds' his creditors. It is no answer to this argument to say, that the debtor provides an ample fund for the payment of the debt, and

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that the creditor is ultimately to be paid in full. The law gives to the creditor the right to determine, whether his debtor shall have further indulgence, or whether he will pursue his remedy for the collection of the debt." Citing *Ward v. Trotter*, 3 Monroe, 1. *Vernon v. Morton*, 8 Dana, 247-63.

The point of view the most favorable to the bank is, that these deeds were executed in order to prevent the sacrifice of its property at a time of the greatest commercial embarrassment. Even that is a motive the law condemns, as an unjust restraint imposed on the creditors of the bank.

VIII. *The trust of September is invalid for want of proper parties.*

The first fact disclosed by the deed and the accompanying circumstances is, that the president of the bank, Mr. Robertson, signs the deed and affixes the seal on behalf of the bank, as the party of the first part, to himself and others as the party of the second part. Thus he acts in the capacity of representor of the grantor and as the grantee.

The acknowledgment of the deed recites, that it was "delivered," and delivery is necessary to its validity. It was delivered, then, we are to suppose, by Robertson taking it into one hand and passing it into the other.

The next person on the list of the trustees who accepted the trust is J. S. Newbold. He was a director of the bank at the time of the execution of the deeds. The next trustee is H. Cope. He was then the superintendent of the suspended debt, and assistant cashier of the bank. The last trustee is J. S. Taylor. He was the chief cashier of the bank. These persons were the most important officers of the bank; viz.: the president, who also was a director; another director; the cashier and the assistant cashier of the bank, all then representatives of the bank, and employed in carrying on its affairs. The only person who was not an officer of the bank, is R. H. Bayard, who was absent, and a resident of another state; and who, from the evidence, does not appear to have accepted the trust, or taken any part in the proceedings with the other trustees. Perhaps, if the other persons were qualified to be trustees, their acceptance of the trust might make the deed valid as to parties; but even that would be matter of doubt, as the trust is granted to the whole five jointly.

The trustees who were to manage the property assigned, were the chief cashier and assistant cashier, who already had the charge of the property, as the officers of the bank. When a delivery of the property was to be made to the trustees the same formality which was followed in the delivery of the deed must have taken place. Messrs. Taylor and Cope, as officers of the bank, were to deliver to themselves as trustees, all the property conveyed,

Can these proceedings be considered in any other light than a change in name only of the officers of the bank? If any doubt should exist as to the answer to this question, it will be removed by considering the subsequent conduct of the officers of the bank.

The president and cashier have continued up to the present time, to act in their double capacity as representatives of the bank and as the trustees. It does not appear that Newbold has ceased to act as a director. The same salary received by the cashier and his assistant is continued to them under the trust, viz: \$4000 for each per year.

If we look at the persons who managed the details of the trusts, we perceive they also have merely changed names, Messrs. Fairman and Goddard, the clerks of the trustees, were also the clerks of the bank. Instead of being called clerks of the bank, they now style themselves clerks of the trustees. Mr. Frazier was the agent of the bank, and is the agent of the trustees.

This want of parties is to be considered in two points of view; first, whether it is such as renders the deed legally insufficient for want of consent, and secondly, should the deed be considered a perfect instrument in form, whether it does not create a presumption of fraud in the assignment. See *Beal v. McKiernan*, 8 La. 569; *Fellows v. Commercial R. R. Bank of Vicksburg*, above referred to. *Reinhard v. Keenbartz*, 6 Watts' Rep. 95. See also, *McClurg v. Lecky*, 3 Pennsylvania Rep. 93.

IX. *The second and third assignments are void, as to the attachment of the plaintiffs, for non-compliance with the laws of this State.*

1. *The assignments made in Pennsylvania, cannot transfer, so as to affect creditors, any property within the jurisdiction of this State, except in the manner and subject to the restrictions prescribed by the laws of this State.*

If the property attached was at the respective dates of the assignments, subject to the jurisdiction of Louisiana, then it is clear that the laws of this State must control its transfer. Or, if the assignments made in the State of Pennsylvania cannot take effect, without a violation of the rights of the creditors secured to them by the laws of this State, or without the performance of all the conditions affixed by our laws to such transfers, then the assignments must conform to the law of this State, or they are void as to the creditors.

But if the property attached was at the dates of the assignments respectively, beyond the jurisdiction of this State, and within that of the State of Pennsylvania, and if the transfer there was complete and perfect in every particular, while the property attached remained within its jurisdiction, and if the assign-

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ments may be carried into execution without violating the rights of creditors acquired under our laws, it may be admitted that the assignments are valid as to all the world.

What then is the law of Louisiana, in relation to the transfer of debts due by persons in this State, so far as the rights of creditors are concerned.

By the 9th article of the Louisiana Code, the principle is declared, that the law of this State regulates the property within its limits, whether it belongs to the inhabitants of the State or to strangers. This rule is general in its terms and applicable to every species of property, whether real or personal, corporeal or incorporeal.

The following article relates more particularly to contracts made in other States, as to property within this State. It declares, that the effect of acts passed in one country, to be executed in another, is governed by the law of the country where they are to be executed. By this article it is declared, that the law of Louisiana shall determine the effect of all contracts to be carried into execution in this State, without reference to the place where such contracts are made, or where the parties are domiciled.

Art. 2613 of the Louisiana Code, prescribes that the transferee of a debt is only possessed of it in relation to third persons by notice of the transfer given to the debtor.

By art. 1963, it is declared, that the property of the debtor is liable for all the consequences attending the non-performance of his obligations. The next article declares, that every act, done by him with the intention to defraud his creditor of the eventual rights the latter has upon his property, is illegal, and may be avoided by the creditor as a fraud upon his rights. Art. 3150 declares, that the property of the debtor, is the common pledge of his creditors, and its proceeds must be distributed among them rateably, except for lawful causes of preference.

Art. 2628 declares, that the debtor being insolvent, may sell his property for a price paid to him, but it forbids him giving any thing in payment but money, to one creditor to the prejudice of another.

By the 239th and the following articles of the Code of Practice, it is provided, that the creditor, by virtue of his attachment, can seize all the property, rights, credits or actions of his debtor, in whatsoever hands they are found. If any person within the jurisdiction of the court, has property belonging to the debtor, or be indebted to him, he can be made a garnishee. The sheriff shall take into his custody all the property attached, with the exception of the debts due to the defendant by the garnishees.

The only difference between debts due by persons within the jurisdiction of the court, and other property is, that the garnishee

cannot be compelled to pay the debt he owes to the defendant until the decision of the suit, while all other property may be taken by the sheriff into his custody. The debt is as much here when the garnishee can be cited, as any other species of property, real or personal.

By combining these articles of the code, the following inferences may be drawn :

1. The property situated in this State cannot be legally transferred by the debtor, with intent to defraud his creditors.

2. That a transfer which operates a distribution of an insolvent debtor's property in this State, otherwise than *pro rata*, or for some preference recognized by the laws of this State, is a fraud upon the rights of the creditors, who may avoid such contract, so far as it operates to their prejudice.

3. That a debt due by a person residing in this State is within its jurisdiction, and the transfer of such a debt cannot be valid as to creditors, unless the laws of this State have been complied with.

4. That the transfer of a debt due by a resident of this State, cannot take effect so as to deprive the vendor's creditors of the right they had acquired under our law, to a distribution of the proceeds of the debt, *pro rata*, or for legal preference.

These inferences are equally just, whether the contracts are made here or elsewhere, and whether the parties to them reside here or elsewhere. The only inquiry is, whether our law considers the property within this State? If it does, the law of this State attaches, and protects the right of the creditors to share equally in its proceeds, or according to the preferences it has created.

The residence of the debtor is the place where the debt is situated. Whatever may be the opinions of jurists elsewhere, in Louisiana this principle must be considered as firmly established. Our laws authorize the issuing of an attachment in case the defendant is about to depart or resides elsewhere, and has property in this State. It is the presence of the property, and the subjecting it to the control of the court, which supplies the place of personal citation. The property stands in place of the person. A debt due to the defendant is situated in the place of residence of the debtor, or rather it follows him wherever he goes. The presence of the debtor of the defendant authorizes the issuing of the process of attachment against the latter, and the service of it upon his debtor, brings him before the court. Upon that principle the United States have been enabled to bring the present action. If debts followed no other locality but that of the creditor, it could not be said that the bank had any property within the jurisdiction of the court.

By the common law of England, adopted by the other States, the transfer of a debt is complete, even as to the third persons, without notice to the debtor.

By the law of Louisiana, France and Scotland, and indeed wherever the Roman law forms the basis of their legal system, notice is necessary.

This is not purely arbitrary. It is part of that general rule which, as to third persons, requires possession of the property to accompany the title. Notice to the debtor operates as the delivery of the possession of the debt. The moment notice is given, possession of the debt passes to the transferee. The transfer of possession is, taking a thing from the control and power of one person and placing it under the control and power of another. When the debtor contracted the debt, he placed it under the control of his creditor. The latter, in his turn, divests himself of the possession by an agreement to that effect, made known to the debtor. The debtor is of right a necessary party to a contract to transfer a debt due by him.

Our laws mete out the same measure of justice to citizens of other states as to our own. Whoever invokes the protection of our laws, is entitled to it against the fraudulent contrivances of his debtor, even though the local customs and laws of another State stand in the way. It is a matter of boast in favor of our system of law, that it has never lent itself to these contrivances to defraud, hinder and delay creditors.

The decisions of this court will show that the inferences we have drawn are correct. *Durnford v. Syndics of Brooks*, 3 Mart. 222. *Norris v. Mumford*, 4 Mart. 25. *Ramsay v. Stevenson*, 5 ibid. 33. *Fisk v. Chandler*, 7 ibid. 29. *Thuret v. Jenkins*, 7 ibid. 353. *Price v. Morgan*, 7 ibid. 709. *Peabody v. Carroll*, 9 ibid. 295. *Badnall v. Moore*, 9 ibid. 405. *Oliviet v. Townes*, 2 ibid. N. S. 100. *Chartres v. Cairnes*, 4 ibid. N. S. 1. (The deed avoided in this last case was subsequently set aside in New York. See *Mackie v. Cairns*, Hopkins' Ch. Rep. 393. 5 Cowen, 57.) *Coxe v. White*, 2 La. 425. *Andrews v. Creditors*, 11 La. 465. *Graves v. Roy*, 13 La. 454. *Kimball v. Plant*, 14 La. 11, 513. *Adams v. Day*, 13 La. 503. *Beirne v. Patton*, 17 La. 591. *Buckner v. Watt*, 19 La. 218. *Fellowes v. Vicksburg Rail-Road and Banking Co.* 6 Rob. 246.

In the case of *Layson v. Rowan*, 7 Rob. 1, there was no evidence to show the insolvency of the grantor, or that the property appropriated was more than sufficient to pay the debts provided for in the assignment. All the evidence showed the good faith of the grantor, and that the property was in the possession of the intervenor, in the State of Mississippi, and was by him brought into this State, and was in his possession when the attachment was

levied, and the court sustained the assignment, on the principle decided in *Thuret v. Jenkins*. If the property at the time of the assignment, had been within the jurisdiction of this State, the court would doubtless have followed the other class of cases from *Norris v. Mumford*, to the present time. The circumstances of this assignment are so different from those attending the assignments now before the court, as to render the decision inapplicable to the present case. We may observe, however, that the assignment in that case was free from the objections which we urge to the assignments now before the court. In that case, the *cestui que trusts* were all named, and the sums due them were specified. The property assigned was fully identified. The creditors were consulted, and one of them was made the trustee. He accepted the trust, and it thus became valid for a greater sum than the value of the cotton attached, and it did not appear that the trustees had received other moneys on account of the trust. The deed does not provide for the payment of the surplus to the debtor, but only to other trustees in a deed which had been accepted by the *cestui que trusts*.

From the decisions in this State, it appears :

1. That this court has had occasion to pronounce its opinion upon seven assignments made in other States, of property in this State, as to the rights of the respective attaching creditors and the trustees created by the assignments, and that no such assignment has ever yet been held valid against creditors, either by the inferior courts or this court.

2. That debts due by persons in this State are placed on the same footing as any other moveable property, and are considered, as to the rights of creditors, to have their *situs* at the domicile of the debtor.

3. That no sale or other transfer of property, within the jurisdiction of this State, has ever been maintained to be valid as to creditors, except the conditions for the validity of such a transfer have been complied with according to the laws of Louisiana.

4. That in setting aside assignments and other contracts, it is sufficient if the law of the foreign State would, if applied here, be contrary to our laws and contrary to the general policy of the State, and the interests of the citizens in general. That the law of this State does not limit its protection to its citizens only, but extends it equally to all the litigants in its courts.

These decisions have been maintained in the other States, whenever similar questions have been presented. See *Milne v. Moreton*, 6 Binney's Rep. 359. *Moore v. Spackman*, 12 Serg. & Rawle, 289. *Ingraham v. Geyer*, 13 Mass. 147. *Lanfear v. Sumner*, 17 Mass. 110. *Lamb v. Durant*, 12 Mass. 54. *Caldwell v. Ball*, 1 Term R. 205. Story's Conf.

Laws, p. 349, § 416 and note. *Varnum v. Camp*, decided by the Supreme Court of New Jersey, and *Huth v. Bank of United States*, recently decided by Chancellor Bibb in Kentucky.

The doctrine of moveables being in any way connected with the laws of the domicile of the owner, is rapidly giving way to the more practicable doctrine which subjects them in all cases, to the law of the place where they are actually situated. The following extract shows the view of the subject taken by Marcadé in his work now in the course of publication, entitled, *Elemens du Droit Français*, vol. 1, pp. 82-3:

"Mais pourquoi donc réputés n'avoir point de situation, quand par le fait ils en ont une? C'est, nous répond-on, parce qu'ils sont ambulatoires, parce qu'aujourd'hui en France, ils peuvent être bientôt en Angleterre. Mais le domicile, par la loi duquel vous voulez les régler, n'est-il pas ambulatorio lui-même? Aujourd'hui en Espagne, ne peut-il pas être en Russie dans un mois? Comment donc rejeter la réalité pour admettre une fiction, alors que cette fiction ne se fonde sur rien et de plus, ne sert à rien? Et non-seulement elle ne sert à rien, mais elle est même plus incommode que la réalité même, et elle jette dans impossibilités qui forcent souvent ses partisans de reculer devant elle. Et en effet, comment le souverain du pays du domicile, de la France, par exemple, fera-t-il respecter les lois sur des meubles qui se trouvent hors des pays soumis à sa puissance, en Perse, par exemple? Est-ce que, logiquement, un législateur peut commander ce qu'il sait n'avoir pas le pouvoir de faire exécuter? Puisque la soumission des meubles à telle ou telle loi ne peut jamais être que précaire et instable, on doit reconnaître la soumission instable à la loi du pays où ils sont, plutôt que la soumission, instable également, à la loi du domicile. C'est avec le souverain du pays où ils se trouvent, qu'ils sont réellement en relation, c'est à sa puissance que réellement et par le fait ils sont soumis; on ne peut donc pas, à moins des règles formelles posées à cet égard par les divers législateurs, les déclarer soumis, par fiction, à l'autorité d'un autre."

Foelix, *Traité du Droit International*, p. 68, No. 38, in commenting on the maxim, *mobilia sequuntur personam*, states, as a qualification, that this rule has no application, where the ownership of moveables, whether corporeal or incorporeal, are concerned. He says: "La règle est sans application à tous les cas où les meubles n'ont pas un rapport intime avec la personne du propriétaire; par exemple, lorsque la propriété de meubles est réclamée et contestée," etc. "Ce que nous venons de dire des meubles s'applique non seulement aux meubles corporels, mais aussi aux meubles incorporels; il y a identité de raison."

The same author, at page 182, in describing such contracts as are made in one country to be carried into execution in another,

says, they are invalid in the latter, "lorsque le contrat est contraire aux bonnes mœurs, ou aux institutions et prohibitions existant dans le pays où il doit recevoir son execution."

We have the authority of Merlin, that when the law of the domicile, and that of the situation, are in conflict with each other, if the question regards the disposition of property, the law of the place where it is situate is to govern. Merlin's Répert. *Verbo*, Statut.

The intervenors appear to place great reliance on the authority of Judge Story. They contend, that inasmuch as the general rule sanctioned by him is, that moveables follow the law of their owner, it follows that the law of Pennsylvania should determine the validity of the assignments.

Is such the opinion of that eminent jurist?

"In regard," he says, in his *Conflict of Laws*, (p. 357, § 423, b.) "to voluntary assignments for the benefit of creditors, which contain preferences, they must, (as has been already stated) as to their validity and operation, be governed by the *lex loci contractus*. If they are valid there, full operation will ordinarily be given to them in every other country where the matter may come into litigation or discussion. *But it is a very different question*, whether they shall be permitted to operate upon property locally situate in another country, whether moveable or immoveable, by whose laws such a conveyance would be treated as a fraud upon the unpreferred creditors."

From the manner in which he states the question, it is not difficult to perceive that, in his opinion, the assignments should not be permitted to operate on property so situated. He lays down the general principle of the common law, that the validity of contracts is to be decided by the law of the place of contract. He enumerates several exceptions to the general rule. One class comprehends those contracts which are opposed to the national policy and institutions. To illustrate this class of excepted contracts, he quotes the case of *Andrews v. His Creditors*. He considers, therefore, that according to that decision, the preferences given to particular creditors is inconsistent with the policy and institutions of this State. The inference naturally is, that this State should not lend its aid to enforce a contract having for its professed object to distribute the property contrary to the requirements of our own laws. See Story's *Conflict of Laws*, p. 214, § 159, a.

2. *The property attached was situated in this State at the time of the second and third assignments, and has remained here ever since.*

The evidence shows, that all the assets, with trifling exceptions, consist of debts which were created originally either in favor of

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the Bank of the United States chartered by Congress, and inherited by the State Bank, or created in favor of the State Bank. The debtors to the bank all resided in Louisiana when the debts were contracted, and have continued to reside in this State ever since. The debts were all contracted in New Orleans, and most of them were made payable here.

Many of them are secured by mortgage upon real estate, situated in Louisiana. The debts were for loans of money, or rather of bank notes made by the bank to the debtors. The debts remained the property of the bank from the time they were created.

But the trustees invoke the benefit of the law of the domicil of the bank to protect the assignments. We think it is already shown that this is not the true law. But testing their right to recover upon the law which they invoke, the operations of the bank in this State will show, that this was the real domicil in relation to the property attached.

There is another point of view in which the assignment may be considered, and which affords a satisfactory answer to the ground taken, that the law of Pennsylvania governs as the law of the place of contract. These assignments were to be carried into execution within this State, and the exception applies as stated by this court, in the case of *Beirne & Burnside v. Patton*, above referred to.

The great object professed in the trust was, to collect the debts due to the bank, with the view of paying creditors according to the terms of the deeds. The collection of the debts attached in this suit, could only be made here, and in pursuance of our laws. The assignments as to the debts attached, were made with reference to Louisiana, and the laws of this State apply independently of the place where the debt may be supposed to be situated.

3. *The assignments are void, as to the attachment of the plaintiffs, for want of notice to the debtors, and because the bank was notoriously insolvent, when the assignments were executed.*

Debts due by persons in this State, can be transferred only in the manner prescribed for the transfer of incorporeal rights. The cession takes place as between vendor and purchaser, by delivery of the title, or evidence of debt. As to third persons the sale can only be complete by notice given to the debtor of the transfer, or by the acceptance of the transfer made by the debtor by authentic act. Civil Code, 2613. By article 3522, No. 23, of the Civil Code, it is declared, that "notice is the information given in writing of some act done." If this rule were applied it would require in every instance of notice given, that it should be in writing.

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The notice to the debtor operates as a delivery of the property, as in case of sale of corporeal effects. *Troplong, Vente*, vol. 2 p. 454, No. 882.

The rule appears to be, that the notice cannot operate the transfer of property to the prejudice of creditors, if such transfer be made in fraud of their rights. "*La signification opère la saisine à l'égard des tiers, mais elle ne couvre pas la fraude.*" 17 *Touillier* continued by *Duvergier*, p. 267, No. 214.

X. The assignments of June and September are to be construed together, and if valid, form a voluntary assignment of the property of the bank within the meaning of the priority act of 1797.

By the 5th section of the act of March 3, 1797, it is provided, that "where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, the debt due the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a *voluntary assignment thereof*, as to cases in which an act of legal bankruptcy shall be committed."

This section has repeatedly been the subject of the decisions of the Supreme and Circuit courts of the United States and occasionally of the State courts. See the case of *Beaston v. The Farmers Bank of Delaware*, 12 Peters, 134. *United States v. State Bank of North Carolina*, 11 Wheaton, 392. *United States v. Hooe et al.* 3 Cranch, 173. *United States v. Mott*, 1 Paine, 195. *United States v. Clark*, 1 *ibid.* 640. *United States v. Shelton*, 1 Brockenbrough, 518. *United States v. Marshal of North Carolina*, 2 *Ibid.* 489. *Harrison v. Sterry*, 5 Cranch, 289. *Downing v. Kintzing*, 2 Serg. & Rawle, 335.

The question, as to what assignments of the debtor are sufficient to let in the priority of the United States, has never been decided or alluded to by this Court.

The fifth section of the act of 1797 provides, that the priority shall attach whenever the debtor has committed "an act of legal bankruptcy." There was, at the passage of this act, no bankrupt law in the United States. It could hardly be supposed to refer to the various insolvent laws of the States. Congress intended to refer to such acts as then constituted acts of legal bankruptcy in the country from which the States had been formed. Unless the clause refers to the bankrupt system of England it is without any meaning whatever.

By the English bankrupt law, as it existed at the time the priority act of 1797 was passed, it was necessary that the assignment should be a general one of the debtor's property, to constitute

an act of bankruptcy. If the deed included part only of the property, so that enough remained to enable him to carry on his business, there was no act of bankruptcy. See 1 Cooke's Bankrupt Laws, 83. *Ex parte Scudamore*, 3 Vez. jun. 85. 1 Burr. R. 674.

In *Gayner's case*, (1 Burr. R. 478, and 1 Cooke's Bankrupt Laws, 86,) there was an assignment of all the debtor's effects, goods, stock in trade, and book debts, *except household goods, watches, plate, bills of exchange, inland bills, promissory notes, and cash then by him*. But the trustees declining to act, the debtor made a second deed, wherein a large parcel of ginger was excepted, as well as the other things excepted in the first deed. Lord Hardwicke decided, that the executing the deed was an act of bankruptcy.

"What assignment of part will or will not be fraudulent," says Cooke, *ib.* 87, "must depend upon the particular circumstances of the case; but a colorable exception of a small part of his estate or effects will not prevent the deed being declared fraudulent, for the law will never suffer an evasion to prevail, to take a case out of the general rule, which is so essential to justice. Therefore, in *Gayner's case*, the exception in the deed, of his household goods, watches, plate, bills of exchange, inland bills, promissory notes, and cash by him, and a large parcel of ginger, was considered as colorable, and not suffered to prevail."

In another case (see 1 Cooke's Bankrupt Law, 92,) Lord Mansfield said: "I take it to be clear law, that if *in contemplation of bankruptcy*, a man conveys to the fairest creditor that ever existed, it is not a fraudulent deed as between them; but *it tends to defeat the whole bankrupt laws*, and as such is held to be a fraud upon the rest of the creditors. It is equally clear, that though it be not a conveyance of the whole of his property, and that a part be omitted, yet, if it be made in contemplation of bankruptcy, it is a preference, and, as such, an act of bankruptcy."

From the 5th section of the act of 1797, above quoted, and the opinions above given, we are entitled to draw the following inferences:

1. The priority attaches equally whether the debtor be a natural person or a corporation.

2. It is not necessary that the assignment should be for the benefit of all the creditors.

3. The assignment must be a general one as contradistinguished from a partial assignment, but it is not essential that it transfer every particle of the debtor's property.

4. It is sufficient if the assignment transfer substantially the debtor's property, so that it disables him from carrying on his business or from paying his debts.

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5. Or it is sufficient if the debtor assign that fund which should immediately, and by preference, have been applied to pay the debt due to the United States.

6. It is immaterial how many deeds are employed to effect a general assignment; the priority attaches to all the property so conveyed.

If these inferences are correct, it is difficult to perceive on what ground the right to the priority can be well contested in this case.

T. Slidell, for the appellants. In the discussion of the intervention of Bacon and his associates, two principal subjects of inquiry are presented:

First. Is their title valid against the United States, considered in the light of an ordinary attaching creditor?

Second. Are the United States entitled to a priority of payment at the hands of the trustees, out of the funds conveyed by the assignment?

First. Is the title of Bacon and his associates valid against the United States, considered in the light of an ordinary attaching creditor?

"At common law," says Chief Justice Parsons, (in the case of *Stevens v. Bell*, 6 Mass. 342,) "every man might prefer any creditor, and might pledge his property and convey it in trust, so that no fraud resulted to others."

In the case of *Pearpoint v. Graham*, 4 Wash. C. C. Rep. 237, Justice Washington says, "One creditor may legally obtain a preference over the other creditors upon general principles of law."

In the case of *Wilt v. Franklin*, 1 Binney, 514, Chief Justice Tilghman says, "The statute of 13 Eliz. c. 5, the provisions of which go no further than the common law as now understood, never had in contemplation to invalidate a *fair* transaction. It was made to avoid fraudulent conveyances, intended for the purpose of defeating, hindering or delaying creditors of their just debts. There is nothing in the statute to hinder a man from giving a *preference* to any creditor he pleases, *before* or even *after* an action brought against him."

In the case of *Lippincott v. Baker*, 2 Binney, 186, Yeates, J., says, "Independently of the bankrupt laws, a debtor may prefer one set of creditors to another, and such a measure would be neither illegal nor immoral."

In the case of *Grover v. Wakeman*, 11 Wend. 194, Judge Sutherland uses the following emphatic language: "It is perfectly settled, both in England and in this country, that a debtor in failing circumstances has a right to prefer one creditor, or a

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set of creditors, to another, in all cases not affected by the operation of a bankrupt system. He may assign the whole of his property, for the benefit of a single creditor, in exclusion of all others, or he may distribute it in unequal proportions, either among a part or the whole of his creditors. No matter how or upon what principle the distribution is made, if the debtor devotes the whole of his property to the payment of just debts; neither law nor equity inquires whether the objects of his preference are more or less meritorious than those for whom he has made no provision." He cites 3 Maule & Selw. 371. 4 Mason, 210. 5 T. R. 235. 6 id. 152. 8 id. 521. 4 East, 1. 1 Atk. R. 95, 154. 2 John. Ch. R. 283. 3 John. R. 71. 5 id. 385. 1 Binn. 502. 10 Mod. 489. 5 T. R. 424. 15 John. R. 583. 5 Cowen, 547.

The principle laid down in Binney has remained unchanged in Pennsylvania. Twenty years after the decision of that case, we find it still cited as authority, and the question is treated as not admitting discussion. "As to the right of a debtor on the point of insolvency to prefer one creditor to another, it cannot be doubted." 13 Serg. & R. 132. See also *Holbred v. Anderson*, 5 T. R. 235.

Nor can it be contended, that though an individual has a right so to prefer a portion of his creditors, a corporation has no such power. Such a position is unsustained by authority; on the contrary, the well settled doctrine in this country is, that in this respect, a body corporate stands upon the same footing as a natural person. See the case of *The State of Maryland v. The Bank of Maryland*, 6 Gill & John. 371, and of *Catlin v. Eagle Bank*, 6 Conn. 233. The last authority I shall cite on this point is the decision of the Supreme Court of the State of Pennsylvania, in the case of *Dana v. The Bank of the United States*. In this case, as in the present, a creditor of the bank attached the assignment, and sought to make the fund assigned applicable to his debt. The decision reiterates the principles and reasoning which are presented by the decisions already cited.

Here, then, is a decision of a Pennsylvania court on the laws of Pennsylvania. As such, this court will consider it as dissipating all doubts, and closing all inquiry; it has adopted and will adhere to the example of the Supreme Court of the United States, who, in speaking of the interpretation of State statutes, thus declares the rule in such cases: "This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle supposed to be universally recognized, that the judicial department of every government where such department exists, is the appropriate organ for construing the legislative acts of that

government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court, to the constitution and laws of the United States, is received by all as the true construction; and on the same principle, the construction given by the courts of the several States to the legislative acts of those States, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled." *Elmendorf v. Taylor*, 10 Wheat. 159.

Apart, however, from all these decisions, this case might safely repose, so far as the question of capacity to assign is involved, upon the acts of the Legislature of Pennsylvania, passed in May, 1841. "That so much of any law or laws of this Commonwealth as requires security from trustees or assignees, or an inventory or appraisement of the property assigned or conveyed in trust, be and the same is hereby dispensed with in the case of any assignment or deed of trust, or other conveyance, made by the President, Directors and Company of the Bank of the United States, for securing the payment of any portion of its liabilities."—Act of May, 1841, sec. 19. Again, "Provided, That the said trustees or any trustees or assignees appointed for the payment, or securing the payment, of all or any portion of the debts of the said bank, shall receive in payment of debts due to the said bank, to them at par, the notes or other evidences of debt issued or created by said bank." The same provisions are found in the duplicate act of May, 1841.

Now, bearing in mind, that the assignment which the law authorizes the stockholders, if they so desire, to compel the directors to make, is described as a *general* assignment of *all* the real and personal property of the bank for the payment of *its debts*, and that the expression "the said trustees or *any* assignees," as well as the expression "*all or any portion of the debts*," cannot possibly consist with the idea of one assignment only, and that too a general one, of *all* the property of the bank, for the protection of *all its debts*, we plainly and unequivocally deduce from this law a recognition of these two principles: first, that the directors had already in law the power to assign a portion of the property of the bank in trust for creditors; and, secondly, that they had in law the pow-

er so to assign in trust for the benefit of a portion of the creditors. The lawgiver thus furnishes a legislative interpretation of the existing law, and this interpretation fully harmonizes with all the decisions which we have cited, as to the capacity of bodies corporate.

And here it is proper to notice an objection raised under the acts of May, 1841.

It is said, that those acts of May, 1841, made the action of the stockholders necessary for the validity of assignments subsequent to their passage.

We may premise, that the stockholders, at their meeting on the 18th of May, 1841, two weeks after the passage of these laws, omitted to order a general assignment, and, on the contrary, did request and authorize the directors to exercise their own discretion as to the expediency, as well as to the time and manner of carrying into effect the resolution passed by them, at their meeting on the 4th of May, 1841, for pledging certain assets in trust for the payment of the circulation and deposits of the bank. In other words, they recommended a *partial* assignment to protect a *portion* of the debts. At the meeting of the stockholders in February, 1842, the stockholders by resolution declared, that the June and September assignments were made in pursuance of authority vested in them; were for the best interests of the bank, and are ratified and confirmed by the meeting. This resolution was passed by a vote of 204 against 109 of the persons present.

The resolutions of the stockholders, antecedent and subsequent to the execution of this assignment, might, if the honesty or the discretion of the directors were impugned, be invoked to establish both; but they were quite unnecessary, either originally to authorize, or subsequently to ratify, the action of the board.

That the directors, under the general principles of law, were competent, *per se*, and unaided by the stockholders, to make this assignment, has been already clearly shown;—that by the acts of May, 1841, the directors were not shorn of this authority, is equally clear.

Before these statutes, the stockholders would have been incapable of compelling the directors to make a general assignment. "The management of the affairs of the corporation," was, as we have seen, vested by the charter in the board of directors. The stockholders could not directly control the board: they could only control them indirectly, by electing in their stead such a board as would conform to their views. This defect, or, at least, absence of power, the Legislature thought proper to remedy; and accordingly declared, that if the stockholders should, at a meeting and by a vote designated, so express their will, the board should, in obedience to that will, execute a general assignment.

Again: before these statutes, in case the board should desire

to make an assignment of a portion of their means for the protection of any of their creditors, the trustees would, under the existing statutes, have been bound to file an inventory, and give security. This would have rendered the assignment, or rather its execution, practically impossible. The amounts involved would, from the nature of the case, have been very great, and the corresponding security so enormous, as to exceed the ability of the trustees.

Here, then, were two subjects to be provided for: to vest in the stockholders a capacity to compel a general assignment of all the property for the benefit of all the creditors, should they deem it expedient; and to dispense any trustees in any assignments that the board might think proper to make, from the formality of an inventory, and the impracticable requisition of security. Keeping in view these two points, the construction of the two acts, so far as concerns the present question, is easily intelligible.

The result is, to exonerate the assignees in every case, from the obligation to file an inventory and give security, and to enable the stockholders to compel a general assignment. Partial transfers, "for the payment of any portion of its liabilities," are left upon the same footing as they were before, except as to the question of inventory and security. Of the power to make such transfers, no one, who has considered the decisions already cited, could doubt. But if there had been doubt, it would be removed by these acts, which clearly recognize the authority, and by admitting them to be good, have the effect of giving to them validity, if legislative aid were necessary.

The plaintiffs say, the assignment of June is a partial one, merely to evade the law; that the September assignment was contemplated at that very time; that the latter is a general one, and the June assignment is to be taken with it; that it is part of it, separate in form but not in substance.

This position involves the propositions:

I. That the assignments taken together, conveyed all the property of the bank. This is not so, for the evidence shows that all the property was not conveyed. Although the portion left was but small, still something was left.

II. That a board of directors cannot assign all the property of a bank, without the assent of the stockholders; this proposition is repudiated, by the decisions in the cases already cited, of the *Maryland Bank*, 6 Gill & Johnson, 375, and of the *Bank of Arkansas*; both were assignments of all the property of the bank, and both were made by the directors without any concurrence of the stockholders.

III. That the statutes of May were framed for the purpose of forbidding a general assignment by the directors, alone; whereas,

we have shown, that the object of those statutes was to vest in the stockholders a power not heretofore possessed by them, to wit : the power of compelling the board of directors to execute a general assignment, if they, the stockholders, should think expedient.

Let us suppose, for a moment, these three propositions indisputable ; difficulties still remain which are insurmountable.

To connect in law the June assignment with those of September, it is indispensable to establish that when one was executed the other was contemplated. Such was the rule recognized in Downing's case, upon which the plaintiffs rely.

In the case before you, not only is no such *contemplation and intention* proved, but there is positive testimony to the contrary, by the plaintiffs' own witness.

Fault has been found with the nomination of the trustees, who are not themselves creditors, without the intervention of the creditors whose interests were entrusted to them.

This objection is unsustained by authority. The same point was made in the case of *Wilt v. Franklin*, 1 Binney, 516. Tilghman, Chief Justice, remarks, "Although it is most prudent and proper to consult the creditors as to the choice of a trustee, when it can be done without great inconvenience, yet when there is no bankrupt law existing, (which is our present situation,) I know of no law which forbids the debtor to make the choice himself. See Wharton's Dig. title "Debtor and Creditor."

It is objected that there is no schedule of creditors.

Now this objection must be weighed according to the circumstances of the particular case. This assignment provides rateably for numerous creditors, whom we may arrange under two classes. The depositors form one of these. The holders of the notes of the Congressional bank, and of the notes and post-notes of the Pennsylvania bank, form the other class. The names of the depositors could have been given, but this would have been but an imperfect schedule. Not so the other class, namely, the holders of the notes and post-notes. To give the names of this class of creditors was an utter impossibility, from the very nature of the case. Many cases might be put, where the withholding of the names of creditors would afford ground for just suspicion.

But on this score every assignment must be judged by its attendant circumstances. In no case, as we shall find from the authorities, does the absence of a schedule create a positive presumption of fraud. It is at most a mere *indicium*, weak or strong, according to the attendant circumstances. See the cases of *Pearpoint v. Graham*, 4 Wash. C. C. Rep. 337. *Stevens v. Bell*, 6 Mass. 434. *Wilt v. Franklin*, 1 Binn. 502. *Lippincott v. Barker*, 2 Binn. 189 ; and see 4 Mason, 219. 17 Serg. & Rawle, 232.

But this objection of the want of a schedule of creditors is urged in another point of view. How, it is asked, can a creditor under the trust, without a knowledge of his associate creditors, compel a dividend? or, how can a creditor of the Bank, not protected by the trust, have an ascertainment of the surplus, and a decree for satisfaction of his debt from the surplus?

Let it be observed in the outset, that it is made the duty of the trustees, from time to time, as often as they have sufficient moneys on hand, to make dividends.—Now the first step towards the accomplishment of this object is, to realize funds. To attain this, the law implies the duty of reasonable diligence and skill; the deed itself expressly imposes it. Suppose the trustees neglect this duty thus doubly imposed by the implication of law, and by their own express contract, what is the remedy? The Court of Common Pleas is invested by the laws of Pennsylvania, with jurisdiction over trustees for the benefit of creditors, and on the application of any person interested, such court may cite the trustees to exhibit an account under oath. Sect. 7, act of 1836. And by sect. 11, whenever it shall be made to appear [and by the clear analogy of the previous section, this may be made to appear by *any person interested*] to a Court of Common Pleas, that a trustee is neglecting or mismanaging the trust estate, such court may issue a citation to such trustee, and may, if the misconduct or neglect is established, dismiss the trustee from office, and by the 23d section, may appoint another in his stead.

It appears also, by the case of *Ingraham v. Coxe*, 1 Ashmead, 38, that the Court of Common Pleas has power to make an order requiring the assignees in a voluntary assignment for the benefit of creditors, to produce and submit to the inspection of a creditor, any books, papers or documents, which are in their possession, and which come to them from the assignor.

But, suppose that the first step, the collection of funds, is accomplished; what recourse has a creditor then? By the 7th section, already quoted, any person interested may cite the trustee to file an account. The creditor is not bound to obtain the aid of his co-creditors. But when the account is thus forced from the trustees, how is a distribution to be compelled? The deed of trust requires, that the trustees should give notice of the intention to make a dividend, and restricts this dividend to those who have proved their claims. The names of those who are to participate in this dividend are thus ascertained. If the trustee has neglected to give this notice, the Court of Common Pleas can compel him to do so. It can, in fact, make the publication itself. By the 9th section of the same law, the court may order publication by its prothonotary, either by a general order,

or by such order as the circumstances of the particular case may require ; and by the 28th section of the same law, it is declared, " that it shall be lawful for the court having jurisdiction as aforesaid, to make such orders and decrees, from time to time, for carrying into effect any trusts as aforesaid, either for distribution of moneys in the hands of assignees or trustees for the benefit of creditors, or for the payment or transfer of funds or effects in the hands of other trustees, or otherwise, as shall be according to law or the terms or intent of the trust." Besides all this, when the dividend is ascertained, a direct action for his dividend lies by the creditor, against the trustee. 14 Serg. & Rawle, 226; 4 Wheat. 210. With what reason, then, can it be said, that, in order to compel a dividend, a creditor would be driven to the intolerable labor of first discovering and then citing the whole of the bill holders and depositors ?

Again, as to a creditor, who seeks to have the surplus ascertained, so as to make it available in satisfaction of his debt. The *residuum*, after the satisfaction of the trust creditors, is the assigning debtors' property. Against this, a creditor of the assignor has a double remedy. This interest may be sold, in Pennsylvania, under execution. It is true, that on execution, one could not seize the property assigned. This would be a violation of the ownership of the assignee, and of the rights of the *cestuis que trust*. These the assignor could not disturb ; nor could his creditor, the plaintiff in execution claiming under him, disturb them. But the residuary interest could be sold, subject to the trusts. The law of Pennsylvania, in this point, goes as far as our own. See 3 Watts, 259. Watts on Sheriff, 181. Tidd's Practice, 1042.

This, however, is not the only remedy. The law of 1836 gives the right of citation to "any person interested," the terms of the law are of the most general character, and cannot be restricted to those who are creditors under the assignment. A creditor therefore, desiring to avail himself of the residuary interest, might compel the trustees, by the same proceedings as we have indicated in the case of a creditor under the trust, to settle the trust, and could cover the *residuum* in the trustee's hands by a process of garnishment. For under the Pennsylvania laws, as under our own, the debtor's property, in this case the *residuum*, may be garnished in the hands of a third person.

The objection that the *cestuis que trust* are necessary parties, and that they must all be sought and brought before the court, is untenable. None but those who have come forward and proved their claims could, under the express terms of the deed, be entitled to any dividend ; besides, the assignee, in a contest with one not a party to the trust, is regarded, like a syndic under our

laws, as the representative of the creditors. This point was decided in the case of *Irwin v. Keen*, 3 Wharton's Reports, 355.

That the May trust contained a schedule of creditors, and the June trust did not, is entirely attributable to the different circumstances of the two cases. In the one, the creditors were very few and were known: in the other, they were very numerous and unknown.

Another objection raised is, *that no time is limited in the deed for the settling of the trusts, or for the notice to creditors to come in.*

It is conceded, that if a debtor should assign his property with a restriction that it should not be disposed of, nor its proceeds distributed till a given time, and that time should be a distant and *unreasonable* one, the restriction might operate the nullity of the deed. But in this deed there is no such restriction—it requires of the trustees reasonable judgment and skill, it directs the sale of the property and the collection of the debts, and commands them, from to time, as often as they shall have moneys of sufficient amount on hand, to distribute them. The assignors well knew, that in the management of so large an estate, in the collection of a vast amount of debts, scattered over the whole Union, and in the bringing forward of the many millions of claims, much labor would be necessary, much delay unavoidable; but how much could not be defined by anticipation. These things were entrusted to the trustees, and in assuming the task thus confided to them, they bound themselves to reasonable diligence and the exercise of a fair and reasonable discretion. The omission of either would be a violation of duty, which would render them personally responsible to creditors, and amenable, under the statute, to dismissal by the proper tribunal.

"When *no time* is fixed for the grantees to apply the proceeds and render an account, the law requires them to execute the trust in a *reasonable time.*" 6 Mass. 343. So Yeates, J. in *Wilt v. Franklin*, 1 Binney, 521, says; "It has been insisted that no time has been limited, within which the execution of the trust should be completed. Where the estate of a person, who has failed in trade, is scattered and dispersed in different places, it is next to an impossibility to fix a period of time, within which all his accounts can reasonably be expected to be adjusted; and in the cases of debtors discharged under the insolvent acts, no period is ever fixed, within which the assignees shall close their trusts."

The law of Pennsylvania on this subject stands on the same footing as our own in the case of syndics. A syndic is not bound by any given time of settlement. He must collect with reasonable diligence, and distribute with reasonable dispatch. For the

omission of either, he is personally responsible, and subject to dismissal.

The case of *Grover v. Wakeman*, a decision made in New York, (4 Paige, 40,) has been cited by the plaintiffs. Even if this decision did go to the extent claimed by the plaintiffs, it could not, in the discussion of a Pennsylvania assignment, overrule a decision of the Supreme Court of Pennsylvania. In the case of *Grover v. Wakeman*, the assignors "excluded a certain portion of their creditors from any participation in the assigned property, unless such creditors will consent to come in and take their share of the surplus, after paying the preferred creditors, and will discharge the assignors from all further liability whether their debts are paid or not." The case seems to have turned on the point of the coercion of a release, under peculiar stipulations as to the time and manner of it. This is the only point of avoidance stated by the reporter; and when this case went afterwards, by appeal, before the Court of Errors, it was expressly avoided on that ground.

The opinion of Judge Washington, in the case of *Pearpoint v. Graham*, 4 Wash. C. C. Rep. 235, is clearly referable to the case where a release is stipulated, and cannot, with any justice, be applied to the present deed.

Another case cited upon this point, by the plaintiffs, is the case of *Hyslop v. Clarke*, 14 Johnson's Reports, 458. The facts were as follows: The assignment was made by Barnet & Henry in trust; first, to satisfy a debt due to Hyslop & Co.; second, to pay all other creditors, proportionally, on condition of their executing releases of their respective demands; and in case the creditors, or any of them, shall refuse to give such releases, then, it is declared, that the last mentioned trust shall cease and determine, and the trustees are required and directed not to execute it, &c.

In the case of *Austin v. Bell*, 20 Johnson, 442, cited by the plaintiffs, there was a stipulation by the assignor for a certain sum for the support of himself and family, for a limited time, and for paying the expenses of suits against the assignor, and also a stipulation that any creditor who should refuse a release, should be excluded from the benefit of the assignment, and his share should be paid by the trustees to the assignor himself.

In the case of *Graves v. Roy*, 13 La. 458, also cited by the plaintiffs, the trust was to accrue to the benefit of those creditors only, who should release, and the whole property of the debtor was not assigned.

In all the cases on this subject, the intent is sought for, and its honesty or dishonesty is gathered from the attendant circum-

stances, and from the practical operation that the deed, fairly and reasonably considered, might be expected to result in.

The court will, therefore, discard the objection, that no time is limited for the final settlement of the trust, or fixed for the call upon creditors, unless they are clearly convinced, upon a candid consideration of all the circumstances, that the omission was not reasonable and expedient; but, on the contrary, a fraudulent contrivance to delay and defraud the creditors of the bank.

Another objection is based upon *the requisition of proof by the cestuis que trust.*

Now, it will be observed, that the deed does not designate what sort of proof shall be required, and we therefore must consider it as requiring *reasonable* proof. Is there anything onerous or unjust in this? An individual comes forward and professes to be a claimant under the deed for a hundred dollars; is it not just that he should produce the bank notes on which his claim is based, and submit them to the inspection of the trustees, that they may know whether his claim is genuine?

Is it not just, when the party comes forward to take his dividend, that the dividend should be endorsed on the notes?

Suppose the deed had contained no requisition at all upon this subject, certainly, as prudent and honest men, the trustees would have been bound to inquire into the claimant's right, and demand the production and inspection of the evidence of the debt. So, as to deposits; though the trustee might know and was bound to recognize a debt on deposit account, yet, if an executor or an assignee of the depositor claimed a dividend, would there be any hardship in requiring the production of the instrument of assignment, or of the letters testamentary? If the trustees reject proof, reasonable according to the circumstances of the case, they reject it, not under the sanction of the deed, but in violation of it; and a clear, judicial remedy lies in favor of the rejected creditor in the proper tribunal, and under the comprehensive legislation already referred to.

In the case of *Halsey v. Whitney*, 4 Mason, 222, there was a requisition, that all persons not named in the schedules should make oath, before a suitable magistrate, of the truth and justice of their claims, if thereto required by the trustee. Justice Story observes of this clause, "It was a useful precaution, not in fraud, but in favor of real creditors." In the case of *Stevenson's Assignees*, 7 Wharton, 450, it was held, that an assignee, under a voluntary assignment for the benefit of creditors, ought not to pay a claim against the assignor without proof, although it is specified in the assignment as an existing debt.

The court will also perceive, that though a creditor neglect to bring in his claim before the declaration of the first dividend, he

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is not thereby excluded from the trust. An opportunity is still left to him previous to each subsequent dividend, with the very proper and equitable right of receiving, in addition to the dividend proposed, such an amount as shall be equal to the previous dividends, which, by his inadvertence or misfortune, he had not enjoyed.

And here it may be as well to notice the subject of the reservation by the bank, of the residuary interest; in other words, the covenant by the trustees to re-convey, when the trust is settled and closed.

Such a residuary interest necessarily arises in every case where property is assigned to pay debts, or to satisfy other specified objects; but unless the assignment be merely colorable, and made for the sake of the resulting trust, it is not void.

In the case of *Lippincott v. Baker*, already cited, the deed was held valid, though it reserved the overplus to the assignor. So also, in the case of the May assignment made by the defendants, the Supreme Court of Pennsylvania, says; "If no provision of the kind had been inserted in the deed, the law, by its operation, would have given and secured to the bank any such surplus. It would, therefore, be singularly strange, that an express provision, in exact accordance with what the law would have done without it, should be made a fatal objection to the validity of the deed."

Again; it is said, *that though the assignment be valid, it is unavailing against an attaching creditor, where the creditors are neither parties to the assignment in its inception, nor have subsequently signified their assent and acceptance, prior to the attachment.* This doctrine certainly finds support in numerous decisions in the courts of Massachusetts. But those decisions spring from the local law.

In Massachusetts, the courts do not possess equity powers. The *cestui que trust*, not a party to the deed and its covenants, has no remedy against the trustees at common law; and if there is no equitable jurisdiction to which he may apply, his rights under the deed are a naked moral right, and not a legal one. If then, the *cestui que trust* has acquired no right recognized by the law, there is no one really interested in the assigned property but the assignor himself; and the law of Massachusetts treats him in such a case, and as regards an attaching creditor, as still the real proprietor, and subjects the property accordingly.

"A debtor," says Chief Justice Parsons, "might, at common law, prefer any creditor, and might pledge his property and convey it in trust, &c.; but, in consequence of our statutes authorizing attachments, and of our want of a chancery jurisdiction, it has been several times settled, that a debtor cannot convey his estate in trust for his creditors generally, without their consent

given to such conveyance; but to creditors consenting, and parties to the conveyance, he may grant all his estate for the payment of their debts, or to secure them indemnities, if thereby he exercise only his right of preference, and do not defraud others. But when the conveyance is in trust for all the creditors generally, without their consent, a creditor is not bound, but may proceed by attachment; for, being no party to the conveyance in trust, he can have no remedy upon it at law, and there is no equitable jurisdiction to which he may apply."

To this purport are the Massachusetts decisions; and there, if they have assented, and have become parties, they are protected; but until then, the attaching creditor may step in. This subject is well explained in 11 Wendell, 249, in the case of *Cunningham v. Freeborn*.

"Neither is it now necessary for a creditor to be a party to, or to assent to such a conveyance to give effect to it, as has been held by some authorities; for it was so held only on the ground of supplying a consideration to support the deed." Roberts on Fraudulent Conv. 429, and cases there cited.

It has been held in Massachusetts, that all the creditors must assent, or be parties to the assignment, in order to give it validity; and that attachments levied before such assent bound the property. 5 Mass. 144. 6 Id. 339. 6 Pick. 350.

But it will be seen, on looking into the earlier cases there, upon this point, that the chief ground of such determination was, the want of a court of equity to enforce the execution of the trust, in behalf of the creditors and a doubt, or at least difficulty, as to the remedy at law.

Chief Justice Parsons, in *Widgery v. Haskell*, 5 Mass. 144, after an examination of the question, says; "It is, therefore, our opinion, that the policy of the law providing for attachments, and not providing any remedy in equity against the trustees, prohibits the establishment of a trust estate by an insolvent debtor for the benefit of his creditors not parties to it."

It is clear, both in England and in this State, that the assent of the creditors is not essential to give effect to these assignments. Roberts on Fraud. Conv. 434, 435. 4 Johns. Ch. Rep. 529, and cases there cited.

"If the conveyance of the property is directly to the creditors, then, no doubt, it is material to show their assent to it, as it requires the agreement of two parties to make a contract; but where it is made to a trustee, for the benefit of creditors, the legal estate or title to the property may pass to him, without their assent, so as to prevent a judgment creditor from acquiring a lien, if real, by his judgment, or if personal, by his execution, unless upon the ground of fraud. There is no defect of legal title in

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the assignee or trustee, and a court of equity will then enforce the execution of the trust. 2 Johns. Ch. R. 307, 308. 4 Id. 529. 6 Ves. 662. 18 Id. 99."

The case of *Brooks v. Marbury*, 11 Wheat. 78, is strongly in point. Ch. J. Marshall there says; (p. 97) "Deeds of trust are often made for the benefit of persons who are absent, and even for persons who are not in being. Whether they are for the payment of money, or for any other purpose, no expression of the assent of the persons for whose benefit they are made has ever been required, as preliminary to the vesting of the real estate in the trustee. Such trusts have always been executed in the idea that the deed was complete when executed by the parties to it."

In *Nicoll v. Mumford*, 4 Johns. Ch. Rep. 529, Kent, Chancellor, says; "The fact of the assent of the creditors to the assignment, prior to the taking possession of the property by the defendant, may make the case more impressive, but I do not consider any express avowal of that assent as necessary to the operation of the assignment.

"If the assignment was directly to the creditors, their assent would be necessary to give validity in law to the deed. But if the assignment (as in this case) be to trustees, for their use, the legal estate passes and vests in the trustees, and chancery will compel the execution of the trust, for the benefit of the creditors, although they be not, at the time, assenting and parties to the conveyance."

A reasonable distinction is found in the books, between those cases where some onerous condition is coupled with the benefit, as for instance, when a release of the debtor is stipulated, and those where the assignment is purely beneficial. In the latter cases the law presumes the assent.

Much stress has been laid by the plaintiffs upon the fact, that after the execution of the June trust, the creditors of the bank still instituted suits, and were pressing them to judgment. What does this prove? Not that they rejected the security already given; but that, being completely unrestrained by the June deed, as to the other property, they sought additional security by obtaining the liens of judgments and executions against the assets unassigned.

If, besides this, they had attempted to levy on the property assigned to the June trustees, or had taken any other steps to invalidate or disturb the June assignment, then a case of rejection would have been made out, and the implied acceptance of the *cestuis que trust* would have been, *pro tanto*, rebutted. But we have no such evidence, and in its absence, the court may well infer, that these judgment creditors have, with the exception of those who have sought this forum, acquiesced in the assignment.

Again; it is objected, that the trusts are void, *because made with the intent to prevent the sacrifice* of the property of the bank.

In support of this assertion, the plaintiffs rely, among other things, upon the resolution of the 23d April, 1841, based upon the report of the committee of conference.

Let it be observed, that it was upon that very report and resolution for the reasons there assigned, and upon the authority then granted, that the May assignment was executed; and that very assignment, though made in favor of the banks, was made in their favor as holders of post-notes; the same class of obligations as is protected by the June assignment.

Moreover, it is evident, that the only reason why the June assignment was not more speedily executed, was the necessity of legislative action on the subject of security. Its details, as we have seen, were entrusted to the same committee as was charged with the assignment for the banks. The above reason is distinctly stated in the report to the meeting of stockholders, held on the 4th May, 1841. They say, that for want of legislative action to grant power for creating the trust, without the securities now required by law, they have not yet succeeded in complying with the wishes of the stockholders, in reference to the circulation and deposits.

The May assignment was attacked in Pennsylvania, but was sustained by the Supreme Court of Pennsylvania. How, so far as the present objection is concerned, could the Pennsylvania court—how can this court—distinguish the June from the May assignment? Compelled by the same importunities; prompted by the same motives; recommended by the same report; authorized by the same resolution, and consummated at a brief interval shall the one stand and the other fall?

Having thus endeavored to show, that this assignment is valid, and passes a good and effective title to this property, according to the laws of Pennsylvania, we now proceed to the consideration of the question, *what effect it should have in the State of Louisiana.*

The plaintiffs contend, that the laws of Louisiana consider the property of the debtor the common pledge of all his creditors; that a person in insolvent circumstances cannot, by the laws of Louisiana, give a preference; that the property here in controversy, and which was transferred by this assignment for the benefit, not of all the creditors of the bank, but of a portion only, consists of debts due by residents of Louisiana; that these debts are property situate here; and that, under these combined circumstances, our courts should refuse to recognize the validity of the assignment.

The general principle, that the validity of a contract is to be determined by the law of the place where the contract is made, is

too well settled to require argument. It is not only recognized by our code, which declares that the form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed, but is consecrated by the law of nations and the general assent of the civilized world. See 8 Mart. 134. 11 Mart. 731. 12 Mart. 481. 6 Ib. N. S. 77. 6 La. 616. 4 Mart. N. S. 1.

But this general rule is subject to certain modifications and exceptions, according to the nature of the subject of the contract.

Thus, the validity of a contract made in one country, with regard to real estate lying in a foreign country, is determinable by the law of the country where the land lies.

But with regard to moveables, the general doctrine is different. These, in contemplation of law, follow the person of the proprietor. *Mobilia sequuntur personam.*

The general doctrine is consecrated by the almost unanimous opinion of all the great lights of international jurisprudence. Fœlix has taken the trouble, in his treatise on the conflict of laws, to collect their names: "*Tel a toujours été le sentiment presque unanime des auteurs et des cours de justice. Témoins, Dumoulin, Chopin, Bretonnier, d'Argentrée, Brodeau, Lebrun, Poullain du Parc, Burgundus, Rodenburg, Abraham à Wesel, Paul Voet, Jean Voet, Sande, Christin, Gail, Carpzov, Wernher, Mevius, Franzke, Boullenois, Pothier, Struve, Leyser, Huber, Hert, Hommel, Danz, Glück, Thibaut, Merlin, MM. Mittermaier, Hauss, Meier, Favard, Duranton, Story, Wheaton, Rocca, et Burge.*"

Our code expressly recognizes this principle in the case of wills made in a foreign country by a party domiciled there, whereby the testator disposes of moveables situated in this State, and gives the will effect, even though the distribution it should order be contrary to our laws. Civil Code, art. 10. Thus, a father domiciled in England, in distributing moveables existing in Louisiana, could entirely cut off his child from any participation in them; though, had he been domiciled here, he would have been obliged to leave him one-third of them. Such, too, is the law of Pennsylvania, where the common law of England prevails. "Personal property," says Lord Loughborough, "has no visible locality; but it is subject to that law, which governs the person of the owner, both with respect to the disposition of it, and with respect to the transmission of it, either by succession or *by the act of the party*. It follows the law of the person. The owner, in any country, may dispose of his personal property. If he does, it is not the law of the country where the property is, but the law of the country of which he was a subject, that will regulate the succession. 'This,' says he, 'is not only the law of England, but of every country in the world where law has the sem-

blance of science." "This part of the *lex gentium*," says Chief Justice Tilghman, in 1 Binney, 347, "is founded on the mutual courtesy of independent governments, looking forward to the common advantages and good harmony of civilized nations."

But what are the modifications to this general rule, that *moveables follow the person*?

Several cases are to be found in our Reports, where the moveable was situated in Louisiana, at the time of the contract, and something necessary under our law for the *consummation* of the contract *as against third persons*, had not been done before the rights of third persons intervened. Thus, let us suppose that, by the law of the owner's domicile, a sale of goods is complete and perfect to pass the title, without any delivery. By the law of Louisiana, a sale is not complete against third persons without delivery. This court, then, has held in the case of corporeal moveables actually here, that the contract was incomplete as against third persons, without delivery, and did not bar an attaching creditor. *Olivier v. Tennes*, 2 Mart. N. S. 93. So, too, it has been held, that, inasmuch as by our law, notice of an assignment of a debt is necessary to consummate the assignment as against third persons, a debt due by a debtor in Louisiana, to a person residing abroad, is subject to attachment, if notice of the assignment has not reached the debtor. Let it also be remembered, that notice, in case of the assignment of a debt, is not of the essence and substance of the contract; nor is it even necessary, as between the parties, to operate the delivery, or in other words, the performance of the contract. "The delivery takes place between the transferor and transferee, by the delivery of the title." Civil Code, art. 2612. The notice is a formality prescribed for the protection of the debtor and of third persons.

None of the earlier decisions of this court attempt to impugn the validity of the contract itself, where it was good and valid under the law of the foreign State where the contract was made. Cases have occurred, where they have considered the laws of the foreign State, to ascertain whether, under those laws, the title was good or bad; but if good there, the contract has not been disturbed here, except in the two classes of cases above stated, where, by our law, something was essential to consummate the contract, as against third persons. Where the contract wanted nothing under our law, for its completion as against third persons, they have sustained the contract, though tainted in its consideration between the parties, with what, under our system, would have been a fraud and a ground of nullity. This position is unequivocally supported by the case of *Thuret v. Jenkins*, 7 Mart. 318.

Under the authority of this and the earlier cases decided by

this court, and of the principle, *mobilia sequuntur personam*, we feel justified in saying, that if this assignment had transferred merchandize or other corporeal moveables, situate at the time in Louisiana, and delivered to the assignees before attachment, the transfer being valid under the laws of Pennsylvania, where it was made, would be held effectual here, provided the delivery was complete before attachment. But the present case is stronger; for the assigned property, with some trifling exceptions, was in Philadelphia at the date of the assignment, and was there delivered to the assignees.

But it is objected, that it consisted almost entirely of promissory notes; that these notes were merely evidences of debt; that these debts were due by citizens and residents of Louisiana, and that a debt is to be considered as located at the domicile of the debtor.

Some of these notes were unmatured, and in such case it cannot be contended, that, for the purposes of transfer, the title and property in the debt is separable from the note. In the case of a negotiable note, the debt passes by the transfer of the note to the endorsee absolutely, and without any necessity whatever, under our law, of notice of the transfer to the debtor.

Conceding, however, for the purposes of argument, with regard to that portion of the notes which had matured, that the notes were the mere evidences of debt, and waiving for a moment that provision of our law, which attaches such importance to the title as to constitute the giving of the title the delivery, let us consider the question as though this had been a mere assignment of debts due to the Bank of the United States by debtors in Louisiana, not evidenced by any written instruments.

Where in contemplation of law, is a debt considered as situated?

A debt must be considered in a double sense, or, as the civilians say, actively and passively; there being two parties concerned, the debtor and the creditor. There is on the one hand, the *liability* of the debtor, on the other the *ownership* of the creditor. For all then that concerns the *remedy*, we may and indeed must necessarily look to the forum of the debtor. The remedy accompanies liability. But, on the contrary, as the ownership of the incorporeal thing called a *debt*, is with the creditor, the conclusion follows naturally, that what concerns a transfer or mutation of this ownership, should be tested by the law of the creditor's domicile. The nature of a debt, then, being considered, and the distinction being kept in view, of the liability which draws to itself the remedy, and of the ownership which draws to itself the control and disposition, common sense at once recognizes the correctness of the well established doctrine fixing the *situs* of the debt with the creditor. That such is now the received opinion no one can doubt.

Burgundus says: "Nomina et actiones loco non circumscribuntur, quia sunt incorporales; tamen et ibi per fictionem esse intelliguntur ubi creditor habet domicilium." Dumoulin is to the same effect: "Nomina et jura, et quæcunque incorporalia, non circumscribuntur loco; et sic non opus est accedere ad certum locum. Tum si hæc jura alicubi esse censerentur, non reputarentur esse in re pro illis hypotheca nec in debitoris persona, sed magis in persona creditoris, in quo active resident, et ejus ossibus inhærent." Casaregis says: "Debitorum nomina tanquam personæ coherentia, debent regulari secundum statuta loci, cui creditor est subjectus."

To the same effect is the case of *Grier v. O'Daniel*, reported in a note in 1 Binney, 349. So Lord Kaimes, considering a debt as a subject belonging to the creditor, says, the natural fiction would be, if any were admissible, to place it with the creditor as in his possession.

Thus, then, in the case of a debt not evidenced by a written instrument, the law would place its *situs* with the creditor. With what color of reason, then, can we refuse to assign the same *situs* to the debt when it is so evidenced, and the evidence is in the creditor's possession?

But it is said, that the assignees can derive no benefit from the transfer, without resorting to this forum to coerce payment, and when they come here, their title must be tried by our laws. We answer, that the law of the forum controls nothing but the remedy against the debtor. It operates only upon the liability of the debtor, and cannot touch the title of the creditor. The debtor may plead prescription, if by the law of the forum it has accrued; he may arrest the creditor's pursuit, by a *cessio bonorum*; he may claim exemption from imprisonment. But he cannot dispute a title of ownership, valid by that law by which it was acquired.

But may not others, who are creditors of the insolvent assignor, attach the debt, when the assignee comes here to prosecute it? Our law forbids preferences, stamps them with fraud, and gives to the creditor of the insolvent debtor a right to rescind them. But on what is the action of rescision based? It is based upon a vice inherent in the substance of the contract. But in this contract there was no such inherent vice. The law of Pennsylvania, where the contract of assignment was made, knows no such vice. Our law, then, cannot disturb it. Take the case of an action of lesion, which, like the action to rescind a preference, has its root and basis in the contract itself. "Lorsque la loi du contrat accorde à l'acheteur, comme au vendeur, le droit de faire rescinder la vente pour cause de lesion, l'action de l'acheteur devra être accueillie en France, non obstant l'art. 1683 du code civil, (la rescision pour lesion n'a pas lieu en faveur de l'acheteur.)" Fœlix, Droit Internal, p. 151.

But, says the same author, in the same paragraph : "Le juge ne pourra admettre d'autres causes que celles autorisées par la loi du lieu du contrat, et il devra les admettre si elles sont fondées dans cette loi." Ibid.

But the *lex loci contractus*, say they, does not apply where the contract is to be *executed* in another country. "L'effet des actes passés pour être exécutés dans un autre pays, se règle par les lois du pays où ils ont leur exécution." What is the meaning of the expression, "to be executed in another country?" It is where the thing contracted to be done or given is to be done or given, not at the place of contract, but in a foreign country. Fœlix, p. 135.

The contract in question was not only made in Pennsylvania, but it was closed and consummated there. If it were true that under our law, notice to the debtors was necessary, yet that, as we have shown, was not a part of the contract—the contract was complete between the parties without it. It was merely a formality requisite for the protection of the assignee against third persons.

But even if this be a case in which the comity of nations is to be disregarded, and the law of Pennsylvania must succumb to that of Louisiana, let us inquire, *what our law is*, and *what creditors can avail themselves of it?*

The revocatory action, in case of preferences, is given by the art. 1965 of the Civil Code. "The law gives to every creditor, *when there is no cession of goods, as well as to the representative of all the creditors*, when there is any cession or other proceedings by which they are collectively represented, an action to annul any contract made in fraud of their rights." "Every contract shall be deemed to have been made in fraud of creditors, when the obligee knew that the obligor was in insolvent circumstances; and when such contract gives to the obligee, if he be a creditor, any advantage over other creditors of the obligor." Art. 1799. Is a corporation to be included under this rule?

There is no insolvent law in this State for corporations. A corporation, then, whether domestic or foreign, was utterly incapable of making, in this State, a *cessio bonorum* for the general benefit of its creditors, or of being coerced into legal insolvency by the proceeding of *forced surrender*. Considering, then, the purpose of the lawgiver, the limited nature of the existing insolvent laws, and the reference to them embodied in the text, we may well doubt the applicability of the code to the case of a body corporate.

If, at the time when the Bank of the United States made this assignment, the creditor who now attacks it, having originally contracted with the bank in Louisiana, was still a citizen and a

resident of Louisiana, there might be found, in the natural duty of the sovereign to protect his own citizens, a plausible pretext to disregard an assignment injurious to that citizen's rights, if ever the assigned property came within her borders and the grasp of her courts of justice. But such is not the case here. The creditor who invokes her aid, is not her citizen; the debt on which his attachment is based was contracted in Pennsylvania, with a debtor then and now domiciled in Pennsylvania. The attachment is levied here, after this debtor, under the sanction of the laws of Pennsylvania, which also presided over the original contract, has made a disposition of his property which Pennsylvania deems just and meritorious.

The case of *Beirne & Burnside v. Patton*, 17 La. 591, has been cited by the plaintiffs. In this case, the property had been shipped to a New Orleans house before the execution of the assignment, and is described as so shipped on the deed; and although it did not clearly appear from the evidence, that it was in New Orleans at the date of the deed, yet the court, in its opinion, says it should conclude that it was here at the date of the deed. The plaintiffs were *citizens of Louisiana*, and doing business in Louisiana, and the notes sued on *were executed and payable here*. Observe how the reasoning of the court points to these circumstances: "Supposing, as it is asserted, that this contract is perfectly valid in Tennessee, and binding on the *creditors and property there*, it does not follow that it is to be received and enforced in this State, to the *injury of creditors who are our own citizens*." In this case, moreover, the court doubts the validity of the deed, under the laws of the country where it was made; for the assignment did "not purport to convey all the property of the defendants, although they profess to make the transfer for the discharge of all their debts." There was a stipulation for release, while some property of the assignor was withheld; the same objectionable feature which overthrew the assignment in Roy's case, to which the court expressly refers. So, too, in the Massachusetts case, which the court invokes, there was a stipulation for release; four months only were allowed for the creditors to come in under it; the trustees were consequently considered as the agents of the assignor till the creditors signed the release; and the attacking creditor was a citizen of Massachusetts. "It does not follow," said the Massachusetts court, "that it is to be received here, to the prejudice of *creditors who are our own citizens*. It is not required by the comity of nations." The court, too, doubted, in that case, whether the assignment was valid even in Pennsylvania. The law of Pennsylvania was not in evidence, and the case of *Wilt v. Franklin*, 1 Binney, which was the only

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case cited by the assignee's counsel, was not considered as sustaining the deed in question.

In the case of *Chartres v. Cairnes*, 4 Mart. N. S. 1, the court say; "The correctness of the judgment of the District Court depends on the validity of the deed of trust; and its validity depends on the law of the State of New York, as being *lex loci contractus*. Both parties, plaintiff and defendants, interested in the event of the suit, are citizens of that State; so that, whatever decision may be given, the citizens of our State will not be affected.

The case of *Andrews v. Creditors*, which the plaintiffs cite, is an authority against them. At page 476, Judge Bullard observes: "We find no difficulty in assenting to the proposition, that contracts entered into in other states, as it relates to their validity, and the capacity of the contracting parties, are to be tested here by the *lex loci contractus*. This court has often recognized that doctrine as well settled."

In the consideration of this subject of the conflict of laws, we have conceded for the purpose of argument, the necessity of notice with regard to the Louisiana claims. Even with that concession, we hope that the validity of our title would be apparent. But how much would the argument of the opposite counsel be weakened, especially as to the question of the *situs* of these debts, and the alleged consequent connexion of our law with the subject matter of this assignment, if we succeed in satisfying the court, that with regard to the mass of the assigned property, and with but a few trivial exceptions, no notice was necessary.

We expect to show, *first*, that notice was given; and *secondly*, that in the case of the transfer of debts, evidenced by promissory notes and bills of exchange, it is unnecessary.

The notices were established to the satisfaction of the inferior court, to which, we presume, this tribunal would be disposed to entrust the labor and the responsibility of these investigations of fact. It is believed that this court would find no reason to differ with the Commercial Court on this subject.

A short time after the assignment was executed, the trustees sent by mail, to the various debtors, a circular addressed to them at their various places of residence.

A large number of creditors who were garnisheed, set up the assignment in their answers, which were offered in evidence in this cause.

The testimony of Frazier shows the reiteration of the notices, on his arrival in Louisiana, to the Louisiana debtors.

The copies of the advertisements published in New Orleans, in the months of November and December, 1841, and of January, 1842, show the publicity which was given in Louisiana to this

assignment. These advertisements contain a reference to the copies of the deed and schedules filed at the office of McKay, a notary, and inform the public that they are to be found there.

The testimony shows that the assignment was a matter of public notoriety.

Again; the United States, as we have shown, were fully informed of this assignment, before their attachment.

Such being the evidence upon the point of notice, is this evidence sufficient in law to bar an attaching creditor?

"The transferee is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place." Art. 2613. This article is the same as the art. 122, chap. vii. of the Code of 1808. The expression in the French text in both Codes, is "*par la signification du transport*," being the expression used in the Code Napoléon, and thus exhibiting a discrepancy between the English and French text.

As to the judicial interpretation of these provisions of the Code, the following principles seem to be settled:

1. No service of a copy of the assignment is necessary.
2. The notice may be verbal.
3. Notice may be proved, as in case of notice to an endorser, by proving it to have been mailed to the party's address.
4. Proof of knowledge of the transfer by the debtor is sufficient.

These principles appear from the following decisions of this court: "The notice necessary in the assignment of debts, *not regularly negotiable, according to law merchant*, may be fairly assimilated to the notice which must be given to endorsers of promissory notes and drawers of bills of exchange; and, although the same exactness and promptitude may not be required in the former case as in the latter, yet, to affect the rights of third persons, personal notice, or *something equivalent*, must be given, and proven, in the event of any contest on the subject." *Thomas v. Callihan's Heirs*, 5 Mart. N. S. 182.

Again; "The testimony shows that the assignee's agent (in New Orleans) gave notice of the assignment to the debtor, but did not give him a copy of the assignment.

"The plaintiff's counsel insists, that the property of the debt, notwithstanding this notice, remained in the defendant, did not pass to the assignee, and was consequently a proper object of attachment. He urges, that the service of a copy of the assignment is necessary to vest the debt in the assignee, as regards third persons. Civil Code, 369, art. 122.

"The difficulty results from the variance of the texts of the Code. The French, invoked by the plaintiff, requires a *signification du titre*, i. e. the legal service of a copy of the assignment;

while the English, resorted to by the assignee, is satisfied by a notice to the debtor of the transfer.

"These texts present two distinct ideas to the mind. In the case of *Gray v. Trafton et al.*, 12 Mart. 702, we thought, that a compliance with *either* requisite sufficed to vest the assignor's right in the assignee, as to third persons. A contrary decision would render our code a *decoy*, rather than a *beacon*. We see no reason to be dissatisfied with the former decision." *Touro v. Cushing*, 1 Mart. N. S. 427.

An inspection of the record in this case, for the reporter has given no statement of facts, will, we think, satisfy the court that the notice was verbal.

Again; in *Gillett v. Landis*, 17 La. 472, Simon, J. remarks as follows: "*We are not aware that any particular form is required in giving notice of a transfer*; the principal object of the law appears to be, to prevent an improper payment after the debt has been transferred, and to protect and secure the rights of the transferee; it matters not in what manner knowledge of the transfer is brought home to the debtor, provided it be clearly shown, that he knew that his former creditor was divested of all his rights to the debt assigned, and that such knowledge of the fact was derived from the transferee, or from his agent. 12 Mart. 702. 1 Mart. N. S. 425. 6 Id. 286."

But secondly—*Is any proof of notice necessary when a debt is evidenced by a promissory note?*

Bills of exchange and promissory notes are not regulated by the Civil Code, but by the law merchant, as understood both in England and in the other States of this Union. That the Civil Code does not apply to them is evident by its own terms. Thus in article 1908 of the Code it is said, "Promissory notes and bills of exchange are not governed by this rule, but by those of commercial law." So in articles 3127 and 3128 of the Civil Code: "When the thing given in pledge consists of a credit not negotiable, to enable the creditors to enjoy the privilege above mentioned, it is necessary, not only that the proof of the pledge be made by an authentic act, or by act under private signature, duly recorded, as stated in the preceding article, but that a copy of this shall have been duly served on the debtor of the credit given in pledge. On the other hand, this notification of the act of pledge to the person owing the debt pledged, shall not be necessary, if the debt is evidenced by a note or other obligation, payable to the bearer or to order, because in that case it will suffice that the note or obligation shall have been endorsed by the persons pledging it to invest the creditor with the privilege above mentioned."

When the Civil Code was prepared, a *projet* of a Code of Commerce was also prepared and simultaneously printed, to wit,

in 1825. The one was adopted by the Legislature: the other, which, like the Civil Code, was mainly taken from the French Code on the same subject, was not adopted. Doubtless, the reason why the Commercial Code was not adopted was, that the commercial law of England and of the sister States of the Union was thought better adapted to the habits and commercial relations of our people.

To ascertain, therefore, the nature of the contract called a promissory note, we must look to the commercial law of England, as understood in her courts and those of the United States. By this law, an unmatured note or bill of exchange passes from hand to hand, without necessity or notice by the transferee to the debtor. Chitty on Bills. But does the negotiability of a note cease when it has passed its maturity? It does not cease, but is only qualified. Let us first show that it does not cease, and then ascertain the qualifications.

"A bill of exchange," says Chitty, "is negotiable *ad infinitum*, until it has been paid by the acceptor; and therefore, if the drawer pay it after it is due, he may, even a year and a half afterwards, endorse it to a fresh party, who may sue the acceptor thereon." Chitty on Bills, 249. It is only when paid by the acceptor that its vitality and negotiability are gone. "When a bill is once paid by the acceptor, it is *functus officio* at common law." Ibid. 247.

"In general, it may be stated, that a transfer may be made at any time while the bill remains a good, subsisting, unpaid bill, whether it be before or after it has arrived at maturity." Story on Bills, 243. "But there is a period when bills cease to be negotiable, in whosoever hands they may then be, so far as respects the antecedent parties thereto, who would be discharged therefrom by the payment thereof. Thus, for example: when a bill has been once paid by the acceptor, after it has become due, it loses its vitality, and can no longer be negotiable." Ibid. 245.

To this effect is the case of *Hubbard v. Jackson*, 4 Bingham, 390.

The court thought the case of *Callow v. Lawrence*, 3 M. & S. 95, in point, and referred to the language of Lord Ellenborough, who said; "A bill of exchange is negotiable *ad infinitum*, until it has been paid by or discharged on behalf of the acceptor."

What is the qualification of this negotiability which flows from the maturity of the bill or note? Simply this: it is subject, to a certain extent, to the equities existing between the transferrer and the debtor at the time of the transfer. Chitty, 243, 246. Story, 243.

But are the United States entitled to a *priority* of payment at

the hands of the trustees, out of the funds conveyed by the assignment?

What must be the nature of the insolvency, then, and of the assignment, to give rise to the priority of the United States?

In 1 Peters, 439, Judge Story says: "Insolvency, in the sense of the statute, relates to such a *general* divestment of property as would in fact be equivalent to insolvency in its technical sense. It supposes *that all* the debtor's *property* has passed from him. This was the language of the decision in the case of *The United States v. Hooe*, 3 Cranch, 73, and it was consequently held, that an assignment of part of the debtor's property did not fall within the provision of the statute."

In 4 Wheaton's Reports, 116, Chief Justice Marshall says: "This being a case of which a court of chancery may take jurisdiction, we are next to inquire, whether it is one in which the United States are entitled to priority. This depends on the fact, whether the deed of assignment executed by Shoemaker & Travers was a conveyance of *all their property*."

So, in the case of *The United States v. Clark*, 1 Paine, 629, Judge Thompson remarks as follows: "The Supreme Court of the United States have decided, that the assignment must be of *all* the debtor's property; by which I understand, that it must be an assignment of *all*, as contradistinguished from a *partial* assignment, or professedly an assignment of part only of the debtor's property."

No doubt, if the assignment be professedly partial, but be in truth general; or, if an insignificant portion be left out, *with the intent to elude the law*, the priority of the United States would attach, and so the Supreme Court of the United States has repeatedly held. See 3 Cranch, 91. 1 Paine, *ubi supra*.

Applying these decisions to the present case, we find an assignment *partial on its face*, and *partial in point of fact*. Not only was the *onus probandi* upon the United States, to prove that the assignment was general—and hence this well ascertained principle of evidence in such cases would have concluded them; but we have here positive proof, that a large amount of the property of the bank was left uncovered.

But, convinced that the priority of the United States could not be sustained against the June assignment considered, *per se*, and standing alone, the counsel for the plaintiffs have endeavored to establish the position, that the assignment of June and the assignment of September are, in law, substantially one assignment; that the September assignment, covering all the remaining property of the bank which was of any value, was a general assignment within the meaning of the statute; and that the June assignment being coupled with it, the whole forms, in contempla-

tion of law, *one general assignment*, and the United States are therefore entitled to priority.

The June assignment being partial on its face and in fact, and being prior in date to the September assignment, and not simultaneous; being, in its form and in its nature, a separate instrument and conveyance, there is but one hypothesis by which it can be linked to, and associated with the September assignment; and that is, that the September assignment was *in contemplation* by the assignor when the June assignment was executed, and that the assignment of June was first and separately made, with the *intent* to evade and defeat the priority of the United States.

The principle is, that a party should not be permitted intentionally to do indirectly, what, if attempted directly, the law would repudiate.

"If," says Marshall, C. J. "a *trivial* portion of an estate should be left out for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be enabled to avail themselves of such a contrivance. But where a *bona fide* conveyance of a part is made, not to avoid the law, but to secure a fair creditor, the case is not within the letter or the intention of the act." This principle is affirmed by Judge Thompson, in Clark's case. See, also, as to the point of contemplation, the case of *Downing v. Kintzing*, quoted above.

A very recent case, *The United States v. McLellan*, 3 Sumner's Rep. 355, is pertinent to the present inquiry; it discusses the subject of *intention*, and explains also the rule of *connexion*.

Was there *mala fides* towards the government when the bank made the June assignment? Clearly not, upon the plaintiff's own testimony. Jaudon tells us, that a large amount of property remained with the bank, and that the bank expected to be able to make arrangements with its other creditors. Was the September assignment in contemplation when that of June was executed? Certainly not, according to the testimony of the same witness, and from a candid and fair consideration of the minutes and proceedings of the board. Three months afterwards, when the hopes of the directory proved fallacious, and the creditors of the bank, though provided for by the June assignment, yet desiring further security, brought suits, and were pressing them to judgment, the September assignment was resolved upon.

But if the government is really entitled to priority, its proceedings in this case are utterly unjustifiable.

What is the nature of this priority? Is it a lien? Is it a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing

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by virtue of the assignment to these assignees? Or, is it a mere right of prior payment out of the general funds of the debtor in the hands of the assignees? These questions are considered by Judge Story, in the case in 1 Peters, 439. "The language employed is that which naturally would be employed to express such an intent; and it must be strained from its ordinary import to speak any other. Assuming that the words 'in all cases of insolvency' indicate an entire class of cases, and that the other member of the sentence 'or when an estate,' &c., is to be read distributively, as has been contended for on behalf of the United States, it does not, in the slightest degree, vary the construction of the statute. It will then read, that, 'in all cases of insolvency, the debt or debts due to the United States, &c., shall be first satisfied.'

"But how are they to be satisfied? Plainly, as the succeeding clause demonstrates, by the assignees, who are rendered personally liable, if they omit to discharge such debt or debts. To enable the assignees to pay the United States, it is indispensable that the fund should pass to them; and if the mere priority of the United States intercepted it, or gave a right to defeat it, the object of the statute would not be accomplished. If the Legislature had intended to defeat the passing of the property to the assignees, as against debts due to the United States, the natural language in which such an intention would be clothed, would be to declare, that so far, such assignments should be void."

"When the debtor," says Judge McKinley, in 12 Peters, 133, "is thus divested of his property, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay their debt first, out of the proceeds of the debtor's property." See, also, 3 Peters's Digest, title Priority.

If, therefore, the United States are entitled to this priority at the hands of the trustees, the seizure of this property was lawless, and the enormous costs of this attachment must be borne, not by the trust fund, but by the United States. The costs must be deducted from the government's claim, and the trustees must respond to them for the balance only.

Lastly. The judgment should, in any event, be limited to the property within this jurisdiction and covered by the attachment; and not be extended to the trust funds out of this State. As it now stands, it concludes the trustees as to the entire property assigned, whether here or elsewhere, and subjects the whole to the priority of the United States.

It is objected to the September trust, that it is invalid for the want of proper parties. This objection is founded on the fact, that one of the assignees did not sign the deed at the time of its execution; and that one of the assignees was the president and a director of the bank, another a director, a third the cashier and a

fourth the assistant cashier. As to the cashier and assistant cashier, they were neither directors nor stockholders, and had no interest whatever in the bank. They cannot be considered, in any sense, as grantors. They were undoubtedly capable as trustees. As to the objections raised to the trustees, who were directors and stockholders, see the decision of the Supreme Court of Arkansas, in the case of *Conway et al. Assignees of the Real Estate Bank*. The assignee, who did not sign at the time of the execution of the deed, did so subsequently.

Grymes, on the same side.

P. Anderson, for the plaintiffs, in reply. The plaintiffs claim a privilege on the property attached, which the court below refused to grant. This refusal constitutes the error which the plaintiffs seek to have corrected. The intervenors contend, that the assignments set forth in their petition, being in existence at the time of the attachment, afford sufficient reason to uphold the decree. Regarding the petition as the history of the origin and extent of the intervenors' rights, it asserts, that the plaintiffs caused to be attached certain bills, promissory notes, securities and evidences of debt and property, which *are the true and lawful* property of petitioners, by virtue of *good and lawful* assignments, and delivery thereof for a valuable consideration and for *just and lawful uses and purposes*: and that the bank, at the time of the attachment, *had no interest in the property*, nor was the property *liable* to be attached or seized.

The evidence offered under this petition, by no means sustains the claim set forth; for in looking to the deeds of assignment, we find, that so far from being the absolute owners, it is declared, that they are to "have and to hold" the property, but in trust, nevertheless, for the following uses and purposes, and for no other use and purpose whatsoever, viz., for the payment of certain of the creditors; and, on certain contingencies, to reconvey to the granor. The allegation that the bank had no interest in the property, is therefore clearly incorrect, as one of the trusts was to reconvey it; and equally clear is it, that the intervenors' claim, according to their own showing, instead of being that of an absolute owner, is of *just such rights* as those creditors might assert under the deed, who come within the provisions of the deed.

The rights of the trustee cannot be greater than those of the *cestui que trust*. Story's Equity Jurisprudence, 977. Fonblanque, 166. 2 Johns. Ch. Rep. 238. *Kirk v. Clark*, Prec. in Ch. 275; and *Adams v. St. Leger*, 1 Ball & Beatty, 181.

From these authorities we are fully warranted in the conclusion, that the trustees who have intervened have not greater rights than the *cestui que trust*.

What are the rights of the *cestui que trust* under the deed?

The recital in the deed of June sets forth, that the bank is indebted to sundry persons—depositors, note holders, and post-note holders, and has resolved to provide an *adequate security* for the payment of said deposits, notes and post-notes, and the interest to accrue thereon. In pursuance thereof, the deed directs the trustees, as often as they shall have moneys on hand sufficient to make a dividend, to divide the same rateably and equally in and towards the payment of the said deposits, notes, post-notes and interest, until the same be fully paid off—"Provided, nevertheless, and it is expressly declared as a condition of this indenture, and of the trusts therein and hereby created, that before the trustees shall proceed to make any dividend, they shall give thirty days notice, calling upon the claimants to come forward and prove their debts, and no creditor shall be entitled to claim or receive such dividend, who shall not have brought forward and proved his debt before the time appointed for making the dividend."

The grant, then, is made for no person designated by name, but for all persons who, at its date, sustained the character of creditor, by note, post-note, or deposit; but upon condition, that within a period of time therein named, they shall assent to the deed, by bringing forward and proving their claims. Although, therefore, all creditors by note, post-note, or deposit, had the power to become *cestuis que trust*, yet those only do in fact become *cestuis que trust*, who perform that condition. The deed, it is true, conveys the legal title to the trustees; but until the notice required be given by the trustees, and until the creditors perform the prescribed condition on which the trusts are declared, the property in the hands of the trustees is under the control of the grantor. The bank, although it parted with the legal estate, yet parted with it on a condition which was to be performed by those for whose benefit it was created, which condition was so interposed as to prevent the trusts from arising; and, therefore, until they did arise, the deed was subject to revocation, and the uses did not vest in the *cestuis que trust*. This view of the case I shall endeavor to illustrate and confirm by authority. Its importance to the present inquiry is obvious, for, if it be correct, it ends the controversy.

Does, then, a deed to uses vest an interest in a *cestui que trust* when it expressly declares, that the use is to arise on a condition, and when such condition has not been performed? Let us look into the history of uses and trusts. The common law originally admitted of no immediate estate in lands which was not clothed with seisin and possession. But in process of time, owners conveyed with livery of seisin to some friend, with a secret agree-

ment, that he should hold it *for the use of the grantor or some third person*. The person to whom the use was limited, called the *cestui que use*, depended entirely on the good faith of the grantee or feoffee to uses. His rights, therefore, were precarious, and, in many cases, failed for want of a remedy. As these conveyances, if not devised, were at least greatly encouraged by the ecclesiastics, as a means of evading the restraints of the mortmain acts, the clerical chancellors, who were learned in the civil law, devised a remedy in their courts. They considered the limitation of a use as similar to a *fidei-commissum*, and binding in conscience. They, therefore, extended to those cases the same remedy that the Emperor Augustus directs the consuls to afford to compel the *hæres fiduciarius*, to perform the trust on which property may have been bequeathed to him.

These trusts were a source of fraud; and the statute of 27 Hen. VIII. called the Statute of Uses, was enacted for the purpose of putting an end to such conveyances, and to subject uses to the rules of the common law. They are declared, in the preamble to the act, to be subtle inventions devised for the purposes of fraud. That statute enacts, that persons seised to uses should be deemed, for all purposes, to have the same estate in the land, that by the conveyance they had in the use. Thus was restored the simple form of conveyance known to the common law. The use was declared to be united to the seisin, and the *cestui que use*, by force of the statute, became the owner in law as well as in equity. The intention of this statute was, no doubt, to destroy uses, but this intention was subverted by the judiciary. It was held that a use upon a use was void; therefore, a conveyance to the use of B. for the use of C. was a trust for C. The statute executed the use in B. so as to give a legal estate, but the subsequent limitation to the use of C., not being executed by the statute, remained a trust, which a court of equity would enforce.

It will be observed, that the statute of uses affected only conveyances of land, because it was that only of which a person could be seised. Chattel interest, says Chancellor Kent, was held not to be within the statute, for it applied only to those who were seised. A chattel interest in lands as well as personal property, not being within the statute of uses, a conveyance of them to a use was the same before as after the statute. That is, they might be conveyed to uses, and the legal title would not be executed to the use.

Now a use before the statute, and a trust after the statute, is defined to be "*Neither jus in re nor ad rem*"; that is, neither an estate, nor a demand; so that it is nothing for which a remedy is given by the course of the common law, being a species of property wholly unknown to it, and for which, therefore, it is im-

possible that it should have made any provision." "It is an ownership in trust, *usus est dominium fiduciarium*—so that *usus et status, sive possessio potius differunt secundum rationem fori quam secundum naturam rei*,—for that one of them is in a court of law, the other in a court of conscience." Bacon on Statute of Uses. 1 Cruise, 265. In courts of law, the limitation to uses was void as to the use. In courts of chancery, the use came to be regarded as the real title, and as the *cestui que use* was treated as a stranger in courts of law, so the trustee was treated as a stranger in courts of equity.

When courts of chancery assumed jurisdiction of uses, they regarded them as powers to control the legal estate. If the *cestui que use* before the statute, or the *cestui que trust* after the statute, was, by the conveyance, owner in trust, those courts would compel the trustees, on application, to convey the title. But if the conveyance, as in the case before the court, contemplated that the *cestui que trust* should only have a security for a debt, then his rights of control were governed thereby, and he could call for no disposition of the legal title inconsistent therewith. So, if the grantor annexed a condition to the use, and required a performance of it before the interest could vest in the *cestui que trust*, a court of chancery could no more dispense with its performance, than could a court of law dispense with a similar condition annexed to an estate at law. What then was the force of a condition at law?

At law, a condition was the only qualification that could be annexed to a title. "It is," says Cruise, vol. 2, p. 4, "a provision, that in case the grantor or grantee does or omits to do a particular act, the estate shall commence, be enlarged or defeated." Conditions, then, providing for the commencement of an estate, are conditions precedent, and those that provide for the enlargement or defeasance of the estate, are conditions subsequent. The former can never be dispensed with, and, unless they be performed, the estate entirely fails,—nay, even if the non-performance of them becomes impossible by the act of God. In cases of conditions subsequent, an estate will not be divested by their non-performance, if reparation can be made for the delay, but when the estate has not commenced, it will never arise, without performance.

Fonblanque, vol. 1, p. 397, says; "At law, that which is granted or reserved under a certain form is never drawn to a valuation or compensation, and he shall make his own grant void rather than the certain form of it should be wrested to an equivalent. For the law allows every man to part with his own interest, and to qualify his own grant as he pleases, and, therefore, will not suffer any satisfaction or recompense to be given in lieu of it, if the

thing is not taken as it is granted. *So in equity*, if a creditor agrees to take a sum of money less than his debt, if paid at such a day, he cannot be relieved, if the money is not paid. And," he continues, "we must agree that men's deeds and wills, by which they settle their estates, are the laws that private men are allowed to make; and they are not to be altered even by the king in his courts of law or conscience. So that, in case of *conditions subsequent*, if the condition becomes impossible by the act of God, the estate shall not be defeated, because conditions that defeat an estate are not favored in law, yet a court of equity cannot (in *conditions precedent*) relieve, by giving an estate that never vested. And if the party himself, who was master of the estate, and might have disposed of it as he pleased, is to be tied down to the terms and circumstances he has imposed on himself and on those that claim or derive under him, those, to whom he gives an estate upon terms and conditions, must stand much more obliged to the performance of the conditions and circumstances on which it is given; and if the condition becomes impossible, even by the act of God, the estate will never arise."

"No creditor," says the conveyance in question, "shall be entitled to claim or receive a dividend, who shall not have brought forward and proved his debt before the time appointed for making the dividend;" and this is declared to be an *express condition to the trusts thereby created*. The trusts, therefore, shall not commence until this act be performed. The condition consists of two things, an act to be done by the trustees, and an act to be done by the creditors. The former to give notice, the latter to prove their debts. The authority before quoted, says, that the condition may be a *particular act to be done or omitted by the grantor or the grantee*, on the doing or omitting of which the estate is to commence or be defeated.

This condition is no part of the grant; it is a clause distinct and separate. It in no manner frustrates it, but only points out who shall receive the benefit of the grant. If there be no such person, or if the person intended does not perform the condition, and until the condition is performed, there is a resulting trust to the grantor. He may revoke the deed—he may require a conveyance—his creditors have the same rights over it that they would have had if the legal estate had never been divided from the use, but both had remained in him as at first. The effect of conditions at common law, being to suspend the vesting of the estate where the condition was precedent, courts of chancery, after the invention of trusts, considering them as the legal estate, adopted, in construing them, like rules; and a condition annexed to a use or trust, came to be considered in those courts, as suspending the use or trust to which it was attached; as in a court

of law, a condition annexed to the estate suspended the vesting thereof until the condition was performed.

"Limitations of estates," says Fonblanque, "whether by way of trust or by estate executed at common law, are to be governed by the same rules." "Trusts," says Judge Story, "which are exclusively cognizable in chancery, are now, in many respects, governed by the same rules as the like estates at law, and afford a like illustration of the maxim, *aequitas sequitur legem*. In point of construction and duration, they are affected by the *same incidents, properties* and consequences, as would, under like circumstances, apply to similar estates at law." In the passage before quoted from Fonblanque, he adopts the same rule. He declares the similarity of construction of a use and a legal estate. He says; "that *at law*, the owner of property may qualify his grant as he pleases, so *also in equity*; if the estate does not vest, by reason of a condition precedent, there can be no relief, for equity cannot decree an estate to commence." Now, when he speaks of cases in equity, he means trust estates, for those are the only estates in land that come under the jurisdiction of those courts. He declares the construction of them to be the same as is given to estates at law.

In further illustration of this doctrine, and also to show the nature and effect of conditions precedent, the court is referred to the cases of *Bertie v. Faulkland*, 3 Ch. Ca. 139, and a case reported by Ch. J. Willes, Rep. 83. And that the cases may be liable to no cavil, I select those where the condition was in restraint of marriage. These conditions were always regarded with great dislike. The Roman law considered them to be contrary to public good, and therefore void. For the same reason, the ecclesiastical courts of England, under whose jurisdiction the personal estate of deceased persons was administered, held them to be void. And the English court of chancery, adopting these decisions, pronounced the same rule as to personal property: but in real estate, as a different rule prevailed at common law, the court, when it obtained jurisdiction through the medium of trusts and uses, held the same rule as at law, and pronounced these conditions to be valid. They are not, however, as I before observed, favorably regarded, and courts lean against them, and take every means, by construction, to prevent their effect.

Cruise says, that a condition may be some act to be performed by the grantor himself. If such a condition be not performed, it must always be the fault of the grantor, and yet, the condition is a good one. The inquiry is not, in any case, who is in fault, but what has been granted, and on what condition. That the creditors had it not in their power to perform the condition, would not dispense with its performance. In cases of devise and bequest

by will, the intent of the devisee governs the construction ; but in the case of deeds the *intent legally expressed* governs. Wills are supposed to be made *in extremis*, and without the aid of counsel.

Whatever, therefore, may have been the intent of the bank, the court can only look to the intent as expressed ; and when the deeds declare, that the proof of the *debts shall be a condition*, it is not competent for the court to say, that the grantor intended that an interest should vest in all the creditors, and that the proof of debts required are only directory to the trustees. This condition declares, in effect, that no trust shall arise in favor of any creditor, until he shall have *brought forward and proved* his debt. This clause has been commented on by the gentleman who opened the case of the intervenors. His object appears to have been to show, that this requirement is no evidence of a fraudulent intent in the grantor. He observes, "the deed does not designate *what sort of proof* shall be required, and, therefore, we must consider it as requiring *reasonable proof*." There are not two kinds of proof, the one reasonable—the other unreasonable. Proof is the effect of evidence. It is a conviction of truth produced by evidence ; and evidence is a declaration under oath by persons legally competent to testify, and addressed to a tribunal legally competent to decide.

The deeds say, that the claims are to be brought forward and proved. Before what tribunal they are to be brought is not designated ; but taken literally, the tribunal must be competent to *receive evidence*, and that evidence must be such as to produce conviction on the mind of that tribunal. The trustees are not such a tribunal. *Testimony* taken before them would not be *evidence*. The deed has not constituted them a tribunal for that purpose, but, on the contrary, by requiring *proof*, the deeds impliedly require that the debts shall be established before a legal tribunal. It seems to be thought, that the trustees can admit to a dividend any claim that they think genuine. Now, this would be true if the deed vested an interest in the *cestui que trust*, and and only required, *as directory to the trustees*, that they should be satisfied of the justice of the claims. But where the deed vests it only on condition, no creditor becomes a *cestui que trust* until the condition is performed ; and, if the trustees admit any creditor on the fund, without proof, they commit a breach of trust—they enlarge the operation of the deed ; and those creditors, who comply with the condition, by making proof, may complain, and make the trustees liable for any amount they so pay to such creditors ; for such creditors are not within the contemplation of the deed. If proving the debt was only *directory to the*

trustees,—prescribing the manner in which they should execute the trust, it would be different. They then might assume the responsibility of a debt being genuine, for if it be genuine, no one can complain—but when proof is prescribed as a condition, no matter whether the debt be genuine or not, the trustees cannot dispense with proof—nor can the court dispense with proof. A creditor not proving is no more within the provisions of the deed than he would have been, had he been expressly excluded.

The learned gentleman continues ; “ Though the trustee might know, and *was* bound to recognize a debt on deposit account, yet if an executor or assignee presented the claim, would there be,” he asks, “ any *hardship* in requiring the production of the instrument of assignment or letters testamentary ? ” Again ; “ If the trustees reject *proof*, reasonable according to the circumstances of the case, they reject it not under the sanction of the deed, but in violation of it, and the rejected creditor may have judicial redress.”

The above quotations will show the entirely erroneous views that are entertained on this subject. Undoubtedly it was competent for the grantors to vest an interest in the *cestuis que trust*, without any condition, because the property was theirs. It was also competent, for the same reason, to qualify the grant by condition. The grantors, in exercising their rights of ownership, did not see fit to vest in the creditors an interest, without condition, and direct their trustees as to the manner of executing the trusts ; but they chose rather to declare expressly, that the grant was on a condition, without compliance with which, no interest should vest. To say, then, that the trustees could dispense with the performance of this condition, is to say, that they had rights not conferred by the deed ; and that they might enlarge the operation of the deed, so as to embrace within its provisions, those that the grantor had excluded, and thus materially change the interest of those who had, by complying with the condition, made themselves *cestuis que trust*.

When, therefore, it is said, that the trustees would be bound to recognize a deposit account ; and that there would be no *hardship* in other cases of requiring proof, there is a total misconception of the powers and duties of the trustees ; not less obvious than when it is declared that the creditors would have judicial rights of redress, should the trustees reject reasonable *proof*,—as if the trustees were constituted a tribunal to settle a controverted claim, and had a right, without proof, to admit a claim, or as if proof—a conclusion of the mind, was in its nature capable of being rejected !

I have said, that the trustees are not clothed with power to ad.

mit any claim without proof, and that proof is not the conviction of their own minds, but of some legal tribunal ; and if it should be urged against this position, that it is unreasonable to suppose that the grantor intended that each claim should be legally established, yet the unreasonableness of the condition is no proof that it does not exist. For if there be no doubt in the words of the grant, then no doubts can be raised from any supposed unreasonableness ; the grantor being bound because of his promise, is only bound in the mode and qualification of the promise ; and, as he had a right to exclude any creditor from the benefit of the trust, so he may exercise the lesser right of excluding all those who do not perform the conditions attached to the grant. If it were the duty of courts to make the deeds and grants of men reasonable, without regard to what they stipulate between each other to be reasonable, judicial duties would be onerous indeed.

In a matter, however, about which two opinions may possibly exist, I choose to take a view of both sides. And in the present, I have no choice, but leave it entirely to the intervenors to say, whether the trustees are constituted the proper tribunal to admit claims or not. If they be, then two things are certain ; 1st. The deeds, by requiring debts to be proved, cannot mean to require *evidence* of facts ; for evidence can only be before a legal tribunal ; 2d. By proof, can only be meant a conviction of the minds of the trustees by anything *that they may choose* to permit to influence them.

This hypothesis taken as true, does, in no respect, change the application of the reasoning ; for it only changes the manner of performing the condition, and does not do away with the condition itself. The condition is the proving of the claim. Now, whether it be proved before one tribunal or another, is very immaterial. It still remains a condition, and the estate does not vest until it is fully performed.

Judge Story says, (2 Equity Juris. 957,) " If creditors are named in the assignment and required to execute it before they can take under its provisions, they must signify their *assent in that mode* otherwise they cannot take under the instrument." The reason of this is, that the grantor has made this a condition precedent, and no power on earth can dispense with it, without usurping the rights of ownership and making a grant under pretence of construing it. In such a case it will be perceived, the estate passes to the trustees, but as will be presently seen, does not pass out of the power of the grantor. In such a case, as in the present, a *power is given* to those persons to obtain a vested interest, but until such trusts arise, they result to the grantor, who retains sole control of the estate. Nor can there be a presumption of assent so as to enable them to take ; for, where the party who has the

right prescribes the mode, a court can indulge no presumption. See the case of *Garrard v. Lord Lauderdale*, (3 Sim. 1,) decided in 1830 by Sir Launcelot Shadwell on the authority of Lord Eldon in the case of *Walwyn v. Coutts*.

Judge Story, (2 Equity Juris. 353,) after commenting on deeds made for the benefit of creditors, observes, "It is proper to add, that in all cases of voluntary assignments, made by the debtor for the benefit of creditors, if such creditors are not parties thereto, *and have not executed the same*, the assignment is deemed in equity as well as at law, to be revocable by the debtor." Now, the commentator has in view two kinds or forms of deeds. The one where, as in the above quoted case, the creditors were required to sign the deed; the other where they are only named by general description, and not required to sign, but are required to signify their assent. In the first case, no interest vests in the creditor before signing; in the other, no interest vests until their assent be signified. This is obviously the meaning; for in the preceding paragraph, he observes, "When a specific time is prescribed for the creditors to come in and assent to the arrangement, *as parties thereto or otherwise*, then they must comply strictly with the condition, or they will be excluded from the benefit of the trust." The deed then, that requires the creditors to sign, gives no interest to the creditors before signing. The deed that prescribes assent by the creditors, *within a certain time*, and in a certain mode, vests no interest unless the assent be given within the time and mode prescribed. If the deed does not prescribe assent or mode, the creditor may claim within a reasonable time; and if the deed be clearly for his benefit, as if it was a donation, his assent to the deed, so far as will enable him to take from the trustee, will be presumed, until the presumption is rebutted.

It is of the last mentioned deeds, and none other, that Judge Story observes, "In order to entitle the creditors to take under the deed, it is not necessary that they should be technical parties thereto. It will be sufficient if they assent to it; and if there be no stipulation for a release, *or any other condition* in it that may not be for their benefit, their assent will be presumed." Whatever condition, therefore, is prescribed by the grantor, even though not a reasonable one, must be complied with; and as the court cannot dispense with it, so can they not indulge in any presumption that would give an interest to a creditor, on any other terms than the grantor has given it.

The deeds now before the court, required as a condition to any interest vesting in the creditor, that he should signify his assent in a particular mode, viz: by producing and proving his demand, and that too within a particular time prescribed by the deed.

Now surely the court cannot dispense with this condition any more than could the court dispense with a creditor's signing the deed, when the grantor had required him to sign. Nor can the court enable the creditor to attain an interest in the deed, by presuming an assent which would be proper enough, when the deed was for the creditor's benefit, and contained no conditions of any kind whatever.

I now propose to examine two cases that have been quoted in the brief of the intervenors. They do not, nor were they intended to assert the doctrine, that an assent of a *cestui qui trust* would be presumed when there was a condition, or where the deed required the assent to be made in any particular mode.

The case I shall first offer to notice is the case of *Halsey v. Whitney*, 4 Mason's Rep. 204. The judge, in his opinion, says, "Previous to the present attachment, the deed had been executed by creditors whose demands and claims are sufficient to absorb the fund." It is quite evident, therefore, that the point did not arise as to the effect of creditors not assenting to the deed in the mode prescribed, for they had assented. What falls from the judge concerning a presumed assent, was not necessary to the decision of the case.

In this deed the title conveyed to the trustees vested an interest in the *cestui que trust* immediately, because the signing of the deed is not made a *a condition to the vesting of the trust*, but is only a covenant with the trustees as to the mode in which they shall execute the trust. The words are, "it is agreed," that is, the trustee covenanted to use certain precautions in executing his duty. The grantor prescribes a rule. His obedience to this rule is the test of his faith. Had the grantor prescribed a condition that the creditors should sign, the uses would arise only for those who had complied with such condition. It will be observed, that the condition of making oath to the debt does not apply to the scheduled creditors, but only to those who might, from inadvertence, have been omitted, and as regarded them, the trustees have the power to dispense with the oath; it is plain, therefore, that an interest was intended to vest in all the creditors, and the covenant is only directory to the trustee.

It is then, of a deed like this, where no condition is prescribed, that the judge says an assent, if clearly for the benefit of the creditor, will be presumed. But he does not mean that a condition, had there been one, would not have to be performed, or that the trustee or the court, could dispense with its performance. It is clearly not in accordance with the subsequent opinions laid down in his work on Equity Juris. 380, 381, 544. "As to trusts created for the benefit of creditors," says the judge, "and to which they are not technically parties, if *bona fide* made, they are valid

by the laws of England, and pass a legal estate to the trustee." This is no doubt true; and it is a result from the doctrine of uses and trusts. For, as has already been observed, the use or trust is no part of the deed, and, independently of the statute of frauds, might have been declared by parol without writing, at the time of executing the deed. But, as has already been shown, it is competent for the grantor to annex a condition to the trust, as it was at law to annex a condition to the estate. "I freely admit," says the judge, "that where there are conditions in the assignment, the presumption does not arise."

The other case which I shall examine is that of *Marbury v. Brookes*. It was twice before the court, and will be found reported 7 Wheat. 346, and 11 Wheat. 78. The leading principle of the decision is not important to the view with which I offer the case to the attention of the court. My object is embraced in the response of the judge to the charge demanded by the counsel, "that if the creditors had not assented to the deed, then the deed was fraudulent and void." "Deeds of trust," says Marshall, C. J. "are often made for the benefit of persons absent, and even for persons not in being. Whether they are for the payment of money or for any other purpose, no expression of assent of the person for whose benefit they are made has ever been required, *as preliminary to the vesting of the legal estate in the trustee.*" Now all this is very true; but I submit whether his Honor did or could mean, that a trust created on a condition, would vest an interest before the condition was performed. This language is used in reference to the deed before him. It vested an immediate and unconditional interest in the *cestuis que trust*. Had the deed required them to become parties, or had it prescribed any other act as precedent to the vesting of the trust, sure I am, that the proper distinction would have been made by his Honor, who too well knew the rights of the grantor, and held them too sacred to dispense with any condition he might have attached to them.

But it may be said, the title passes to the trustee. The assent of the beneficiary is not necessary to the completeness of his title. In whom, then, are the uses, if not in the creditor? To this I reply, that the uses and trusts, in case of a condition precedent, result to the grantor until the condition be performed. Suppose a conveyance in trust, and no trusts are declared; in such case there is a resulting trust to the grantor. Suppose a debtor deliver money to a third person to pay his creditor—this is a trust. "But even here," says Judge Story, "the trust is not, under all circumstances, absolute; it may be revoked; and then arises an implied trust, which results in favor of the party granting it." The result of this reasoning is, that the uses and trusts under this deed resulted to the grantor until the condition was per-

formed; and as that has not been performed, the attachment of the government, seizing all rights of the grantor, at the time his rights were entire over the property, has obtained for the plaintiffs a right to the privilege refused by the court below, notwithstanding the deeds.

But to return to the proposed examination of the deeds for the proof of intent. I shall attempt to show, that it was the intent of the grantor to create a condition to the grant, so as to prevent the trusts vesting before its performance; and that if we were at liberty to disregard *the intent executed*, and seek the intent from *the general scope of the deed*, we should come to that conclusion. My remarks apply to all the deeds executed after that of the 1st May.

The recital of the deed declares a purpose of providing an adequate security for the payment of all, save as therein excepted. Without again calling the attention of the court to the declaration of the trusts which limit, by express condition, the general declaration of the recital, I proceed to a subsequent part of the deed, which declares; "That the trustees shall from time to time make dividends to creditors who shall come in and prove, *until a final dividend be made.*" Now, the deed requires a final dividend to be made on either of two events taking place; 1st. Whenever, the moneys arising from the property granted shall be exhausted. 2d. "Or where all the creditors *who have brought forward and proved their claims* be paid in full, principal and interest." It is obvious, therefore, that this second contingency may happen long before the moneys arising from the granted property is exhausted. Suppose the trustees give notice that a dividend will be made, and let it be supposed that they have \$100,000 to divide; if the claims that come in amount to a sum exceeding \$100,000, then it must be declared equally on such claims, postponing the interest on all. But suppose the claims that come in do not amount to more than \$50,000; then has happened the second contingency, by a sufficiency being realized to pay principal and interest to "all who have come in and proved their claims."

The trusts from thenceforth cease, and the deed declares, "that no creditor shall have any claim on the *remaining fund or upon the trustees*, or the trusts hereby created; but the same, except the trust for reconveying to the grantor, shall determine and be at an end." The deed therefore, clearly and in express language contemplates, by its *intended* operation, a right to close the trusts before the payment of all the notes, post-notes and deposits, which the recital in the deed declares it is the object of the deed to provide for.

I shall presently show, that the recital is no necessary part of the deed, and therefore cannot qualify the grant. At present, I

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call the attention of the court to the fact, that if the deed was intended to vest an interest in all the creditors without bringing forward their claims, no subsequent act could divest them of their interest. Their omission to do so would not prejudice them. Suppose, after a final dividend as contemplated by the second contingency, a creditor were to come upon the trust. It would be in vain for him to urge, that the deed gave him a vested interest, and that the bringing forward his claim was only directory to the trustee. The reply would be, that the deed never contemplated vesting an interest until the claims were produced and proved, and that not being done before a final dividend, the trusts never arose for his benefit.

Again; the deed provides in the same clause, that if the grantors pay off and discharge the said *deposits, notes and post-notes*, then and thenceforth the trusts, or *so much of them as shall then remain unexecuted*, shall cease, and the trust property be reconveyed. Now the deposits, notes and post-notes, on the payment of which the trusts are to cease, are such as shall at any time be brought forward and proved. If the payment of all were contemplated, then the words "so much of the trusts as shall then remain unexecuted," would not have been used, as there would, on the payment of the whole, be no further trusts remaining unexecuted.

The requirement of the trustees to close the trusts, on paying all who may at any time come forward, and the power reserved to the grantor to put an end to the trusts by making payment to such as may at any one time have come forward, sheds light on the motives of the grantors. When I come to consider the effect of these clauses in connexion with the rights which a debtor, by the common law, has to devote his property to the payment of certain of his creditors in preference to others, I trust I shall clearly show, that these clauses are wholly inconsistent with its doctrine and precepts, and plainly violate the spirit of the 13th of Elizabeth. But at present I advert to those clauses only to show, that the grantors, so far from intending that the words used in the deed, which expressly create a condition, should not so operate, did really intend that they should have no other operation; and that to have invested all the creditors with an interest, would have disabled the bank from closing the trusts, which they clearly intended to keep within their power.

The recital in the deed would lead us to believe, that an interest was to vest in all the creditors; but such a view is inconsistent with the deed of which the recital forms no essential part.

"The recital," says Cruise, "is a narrative of facts to explain the grantor's will, and *the motives and reasons* on which the deed is founded. They are not necessary; and a misrecital will not invalidate a deed." It is laid down by Lord Coke, (Co. Litt.

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352 b,) "that a recital does not *conclude*, because it is no *direct affirmation*." It does not create an estoppel when the recital is a general one. It is, therefore, obvious that, in testing the effect of a deed, no reliance can be had on the recital, and when the premises, or the *habendum*, or the declared trusts contradict the recital, the latter is of no avail.

That the grantors intended to retain as much power over the trust, as a specious security of the granted property would permit, is also evident from their own declarations and acts. After the creation of the trust of June, and between the time of its creation and the deed of the 4th of September, the bank, *not the trustees*, had paid off and reduced the debts secured by the June trust more than three hundred thousand dollars, *as appears by the books of the bank*. So say the witnesses. Now I submit, whether a candid examination of this fact does not show, that the grantors, as well as the trustees, considered that no interest vested by the deed in all the creditors by note, post-note and deposit. If such an interest did vest, and the bank had devoted irrevocably so much property to secure the payment of those debts, would the bank, without communicating with the trustees, have discharged a portion of those debts? Suppose, as is probable, that the debts thus taken in by the bank were notes of ordinary circulation,—what was to prevent a re-issue of those very notes? When this consideration shall be urged as proof of constructive fraud, it cannot, I conceive, be resisted: but as to the present argument, does it not persuade every candid examiner, that the deed was intended only to vest an interest in those creditors who should come forward; that it was never intended to be executed; but only to protect the property, and to give time to the bank, by delaying the creditors, to make their assets more available to themselves?

The intended operation of the deed was to protect the property, and at the same time, not devote it to the creditors beyond recall. It may be asked, how the condition to the grant would effect this; for if the uses resulted to the grantor, and he was as effectually owner as before, the conveyance, the deed, could give no protection. The reply is obvious. The estate in the hands of the trustees with a resulting trust to the grantor, is no longer *legal assets*, and cannot be sold under an execution at common law. It cannot be sold in England, nor in any state in this Union governed by the principles of the common law. In many states, the interest of the *mortgagor in possession* is sold under execution, because possession is a constituent of legal ownership; and therefore, being a legal right, is subject to sale. In some states of the Union, the statute governing executions provides, as does our Code of Practice, for the sale on execution, of *all rights*,

as well as all property of the debtor. In such states, the equity of redemption is often sold. But can it be sold in the State of Pennsylvania? To prove that it may, the counsel for the intervenors cites the case of *Taylor v. Rodgers*, 3 Watts, 259. In this case, the steam-boat seized and sold had been, and was at the time of seizure, under lease to Woods & Beer. Now it is plain, that notwithstanding the lease, Taylor and Rodgers were the owners of the *legal estate*. The right of Taylor and Rodgers is not like the rights of a grantor in whom there is a resulting trust. The first is a *legal right*—the last is an *equitable right*; and although the latter may be as efficient in the control of the property, yet it is a right that the common law does not recognize.

Let us suppose a creditor of the bank taking counsel as to the course he ought to pursue, even supposing that an execution could sell the *residuum*. In the first place, he applies to the trustees to know how many creditors of the bank are entitled to an interest. They reply, that they do not know. If he then makes a purchase, he confirms thereby, the rights of all those who may have claims under the grant. And as to the purchaser, what are his rights? In a court of equity, if he can find such a court in Pennsylvania, he may set up his purchase and call for a conveyance to himself from the trustees. Now, I apprehend, that no one would buy such a *residuum* if it could be sold—and no creditor, with any hope of success, even if he had an appropriate remedy, would think it prudent to encounter so much litigation as assailing the deed would give rise to. "An equity of redemption," says Sir Matthew Hale, "is an equitable right." So Lord Nottingham says, "An equity of redemption cannot be sold on execution—for it is nothing that the law can recognize, and has made no provision for."

I have then, I think, established, that by the deed, giving it the full effect that the grantors contemplated, and the full legal effect as executed—the trustees have not greater rights than the *cestui que trust*; that the rights of the *cestui que trust* never became vested, by reason that a condition annexed to the grant was never performed, and therefore the trusts resulted to the grantors, and were in the bank at the time the attachments were levied; and, as the plaintiff is entitled to all the rights of his debtor, it results, that the plaintiff has hown a right to a decree for a privilege on the property which was refused by the court below.

Proceeding to another point; let us take for granted that the trusts vested immediately on the execution of the deed; that no condition was interposed; that no assent to the deed was required; that the *cestuis que trust* are presumed to have assented to the deed,

and to all the consequences of such assent—and then let us inquire, what are the rights of such *cestuis que trust*, for we have already established that the measure of *their rights* is the measure of the *rights of the trustees*. The court will not fail to observe, that I have all along taken for granted, that the deed is *bona fide*, and that it may operate as the grantor intended. What then, on the supposition that the interest vested, are the rights of the creditors? This question is easily answered. If the interest vested in all the creditors unconditionally, then the trustees held the legal title for their benefit, and also for the benefit of the grantors, to the extent of all the rights that the grantors had secured to themselves. The creditors' rights are the rights of a mortgagee, and are identical with the rights that grow out of an act of pledge by our law. A mortgage at common law may be of real or personal property, and usually is a conveyance of the legal title by the mortgagor to the mortgagee, with a clause that the conveyance is to be defeated on the payment of the debt intended to be secured. The mortgagee becomes at law the owner of the property; but equity, considering the debt as the principal thing, regards the right of redemption as the *estate*, and gives such relief against the conveyance, as is consistent with what that court regarded as the real intent of the parties; viz., securing the payment of a debt. This equity of redemption could not be destroyed, without resorting to that court and calling on the debtor to pay. This produced vexatious delay; for the court not only enlarged the period of redemption from time to time, but, as all persons interested were required to be made parties to the bill, it was often difficult to obtain adequate relief. To obviate these evils, it became usual to insert powers of sale in mortgage deeds. These were granted to the mortgagee himself, who was authorized to sell the property conveyed without resorting to a court of equity. From this, the step is easy and obvious to the practice of conveying the property in trust to some third person. Lord Eldon considered the power of sale in a mortgage deed as extraordinary and dangerous, and unknown to his early practice, and was of opinion, that the power ought, for greater safety, to be placed in a third person as trustee for both parties. See 4 Kent, 140.

It appears then, from this slight review of the origin of trust deeds, that the interest of the *cestui que trust* in the deed is the same as was the interest of the mortgagee before the trust deed was resorted to—that is, he has a right to control the legal estate in the hands of the trustee, *so long as he can show that his debt is unsatisfied, and no longer*. As equity would, in the case of a mortgage, compel the mortgagee to reconvey on the payment of his debt, so equity will compel the trustee, on a like event, to reconvey to the grantor. Now such being the rights of a *cestui que trust*, let

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us inquire, what were his remedies for enforcing those rights. At law, he, by his trustee, was entitled to sue for and obtain the possession of the property, without regard to the trusts; for a court of law would not notice the trusts. If however, the trustee proceeded at law, and sought to recover possession against equity, the debt being paid, the grantor, or any claiming under him, might have an injunction in chancery, and the possession would be decreed to the grantor, or those who claimed through him. If the trustee proceeded in equity to establish the trust by a decree, a court of equity, as I have already shown, would not proceed unless the *cestui que trust* was made a party, and it was shown to the court affirmatively, that the trusts remained unperformed, and *then* such a decree would be made *as the equity of the case might require*.

Such then, being the remedies afforded by the common law, we are led to the inquiry, what are the remedies which our courts afford. It will not be denied, that our courts are competent to do justice in all cases that come before them; nor can it be questioned, that they will do justice *according to the mode which our laws prescribe*. It has been too often decided to admit of a doubt, that the remedy must be according to the law of the forum. Admitting then for the argument, that an interest vested in all the creditors, and admitting that in a court of law, the trustees could recover and obtain possession of the property without showing that the debts were unpaid, it by no means follows, that our courts will proceed to enforce those rights in the same mode. We will protect the rights of the *cestui que trust*, when those rights are made to appear, and we will protect them in a way that our laws prescribe. The intervenors, by appealing to our courts, assent to receive justice in the mode that our law requires it to be given, and not in a mode that the courts of Pennsylvania may give it in her courts. In Pennsylvania, it may probably be given by directing the possession of the property to be restored to the trustees; but such is not the mode adopted in the courts of Louisiana.

The Code of Practice from art. 389 to 403, points out the mode of proceeding to secure the rights of persons who are the absolute owners of property in their own right, and also the rights of persons who claim an interest in property for the security of debts. In the latter case, the property is directed to be sold, and all persons having liens on the property may, by establishing their claims, come in on the proceeds. This, then, is the mode in which our courts afford a remedy to the present intervenors. The property must be sold, as it has been; and then, if the *cestuis que trust*, or the trustees on their behalf, can establish the existence of debts having a lien prior to that created by the attachment, they will be entitled to prior payment. It has been shown—

may, it seems admitted by the intervenors, that the interests they represent are those that a pledgee of property has in the thing pledged, and that the mode in which that interest is secured, is by the legal title being placed in their hands. Is it not obvious, that the mode of securing the right is a thing distinct from the right itself? A court of equity, as we have seen, disregards the mode, and would pay no attention to the title of the trustee, any further than the *ascertained* interests of the *cestui que trust* would demand. With what propriety then, can the trustees, intervenors in this case, require the court to disregard the rights which the attachment gives, at least to the *residuum*—refuse to ascertain the *residuum* by a sale—decree the possession to them without proof that any *cestui que trust* ever has or even will claim under the deed, and with strong proof on the record that many, if not all of them, have repudiated the deed!

It is said, that the legal title vests in the trustees. But this does not give any other rights than if a pledge had been executed. Such was the decision of this court in a case entirely similar to the present. An absolute sale had been made, but the object was to secure a debt. The court directed the property to be sold, treating the absolute sale, not as transferring the property, but as giving priority of payment out of the proceeds. Such was the decision in the case of *Williams v. Stephens*, 1 Mart. N. S. 417. 2 Ib. N. S. 22. Why then should the property be decreed to the possession of the trustees, when ample justice can be done to all by a sale of the property, and a distribution according to claims established between creditors in common? If restored to them, how, when and where is the present plaintiff to obtain a knowledge of the extent and value of the *residuum*? He may sell it *cum onere*, say the intervenors. It might be sold, say they in Pennsylvania. Can any reason be assigned why some judgment creditor there has not sold it? Or can any reason be given, why the property itself should not be sold according to our own law, which is the mode of procedure adopted and presented by our law?

Let us now proceed to examine, whether the deeds set up by the intervenors made in the State of Pennsylvania, were valid according to the laws of that State. If they were not valid there, the conclusion is irresistible, that they are not valid here or anywhere. The laws of that State are those known as the common law of England. These laws will be found in all essential respects, to resemble our own. In looking into our own code, we find it laid down, "that there is a right implied in all obligations, that the property of the debtor shall be liable for the consequences attending their non-performance," and as a consequence flowing from this principle, "that every act done by a debtor *with the intent* of depriving his

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creditor of the eventual right he has on the property of such debtor, is void as respects such creditor." This announces the general principle of law flowing from the relation of debtor and creditor. Extensive as it is, it is not more unlimited than the principles of the common law.

In order to illustrate the different modes by which our own law and the common law arrive at the same end, I refer the court to art. 1975 of the Code, where it says ; "If the contract be purely gratuitous, it shall be presumed to have been made in fraud of creditors, unless," &c. Now the presumption here mentioned, is a presumption *juris et de jure*. The statute specifies one state of the case in which the presumption does not arise. But with that exception, in all other cases, the presumption of fraud attaches. Should a contract thus deemed fraudulent be presented to the court, would it waste time in hearing evidence of the intent of the contracting parties? Would not the presumption adhere to the contract, and produce its legal effect, even though the contracting parties were as pure as angels, and the court were possessed of full evidence of their purity? It is thus, by prescribing a positive rule, that our law has guarded against voluntary conveyances.

The statute of the 13th of Elizabeth has effected it in a different mode. It declares all acts done with a view *to delay or defeat a creditor* void ; and courts of law and equity, under this statute, without a positive enactment, decide voluntary deeds to be made with that view, and *therefore*, void within the purview of the statute ; whether the motive that induced the conveyance was a corrupt one or not. It would be taking a very inadequate view of this great statute, to suppose that those conveyances only came within its influence, in which the contracting parties were actuated by corrupt motives. The statute only announces a general principle, as do articles 1963 and 1964 of our Code ; but it is to the decisions under this statute that we must look, if we wish to become acquainted with the pure morality it inculcates. In them we shall find evidences of practical wisdom, looking to the object to be attained by an honest and direct appropriation of property to the obligations contracted by its possessor, and condemning all colorable pretexts and appearances. No presumed purity of intention—no plausibly devised motive of preserving the property from sacrifice—no ambiguous morality, disarms the vigilance of this statute. If the grantor's circumstances be embarrassed, suspicion is awakened—if all his property is granted to some, in exclusion of other creditors, suspicion is heightened—for in such a conveyance is seen a departure from equity. If an interest be reserved to the grantor—if he retains directly or indirectly the power to recall the property granted, or to change beneficiaries of the grant, or to lessen or impair their interest—if coer-

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cion is used with the creditor, inciting his hopes or fears by uncertain clauses, by discretionary powers, by protracted settlement—in short, if there be any ambiguity or indirection, however plausibly it may be accounted for, the conveyance is blighted by the pure spirit of the statute; and whatever may be the motives of the contracting parties, it becomes utterly void.

Let us investigate more minutely the statute of Elizabeth, and ascertain from decisions under it, some general principles by which we may test the deed in question.

There are two statutes, one denominated the 13th, the other the 27th of Elizabeth, which were enacted in the reign of that sovereign, and made to suppress frauds. The first relates to frauds on creditors, the last to frauds on purchasers. Those statutes, so kindred in principle, are treated in conjunction by most writers. With the latter, however, we have nothing to do. The former, which by a provision of law is re-enacted in the State of Pennsylvania, contains substantially the following clauses.

“For the avoiding of fraudulent grants both of lands and goods, which in those days are more commonly used than hath heretofore been heard of, and which have been and are contrived of covin, collusion and guile, to the end, purpose and intent to delay, hinder and defraud creditors and others of their lawful suits, not only to the hindrance of the due course and execution of law, but to the overthrow of all plain dealing between man and man without which no civil society can be maintained or continued, therefore be it declared and enacted, that all grants of lands or goods made to or for any intent or purpose above declared and expressed, shall be void against all persons whose actions, suits or debts, are, shall or might be in any wise disturbed, hindered, delayed or defrauded.”

The *intent to hinder or delay* is an intent which this statute declares to be fraudulent; and if a deed be made with a *view to effect* a hindrance or delay, such deed is void, whether it produces its contemplated effect or not; and it is void, not only as to the creditor whose rights are designed to be delayed and hindered, but also as to all other creditors, whether they were such before or after the conveyance.

“The fraud,” says Roberts, page 35, “does not consist in the *actual deception of the creditor*, but in making a conveyance with a *view to deceive him*. It is not the accomplishment of the deceit that constitutes the fraud, but the deceitful intention manifested by the conveyance.”

Now it is said truly, that this statute did not intend to avoid deeds made *bona fide*, and on good consideration. But the ques-

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tion whether any particular deed was *bona fide*, was quite a different question after the statute, from what it was before the enactment. The last quoted author, speaking of the first expounders of the statutes of Elizabeth, says; "They resolved on such a construction of them as might extract from them an operative and beneficial law, and, as they seemed purposely written in general language to give room for a more extended judicial interpretation, they considered largely their spirit and purview, and framed upon them certain rules of evidence for the suppression of fraud, which as they are the result of strong sense, and founded on general utility, ought not to be lightly departed from for the sake of obviating particular hardships. The luxuriant intricacy of the legal modes of transfer and forms of technical proceeding, as they multiply the means of fraud, so they call for the increased vigilance of the law against colorable and equivocal transactions. Legal artificial presumptions are resorted to in aid of this vigilance, and where experience has pointed out a successful engine of fraud, the very use of that engine is made to supersede inquiry into intention, by being itself turned into a strong presumptive indication of fraudulent design."

Let us turn to the case of *Twyne*, (3 Co. 81.) "Pierce was indebted to *Twyne* £400, and to C. £200. C. brought suit, and pending the writ, Pierce being possessed of goods to the value of £300, made a deed thereof to *Twyne*, in satisfaction of his debt, but remained in the possession of the goods." This deed was declared to be fraudulent and void, within the statute.

Let us examine the particular badges of fraud enumerated by the court, and endeavor to lay hold of the *general principle* that guided the judges to their conclusion. I lay it down to be this; that if a deed, from its terms, or the situation of the parties, or from any cause, creates a well founded belief that the *grantor may*, notwithstanding his grant, possess the power, either directly, without the consent of the grantee, or indirectly by his connivance and assent, to control the property granted, then such deed, as regards creditors, is colorable and void. The proposition is, that a well founded belief *that the grantor may control the property granted*, avoids the deed. That he has the power, either express or implied, is sufficient; it is not required that he should use it. That *there be cause for a well founded belief* that he has such *power* is sufficient; it is not required that, he should in fact possess it. If it be required under the statute as before, to prove a fraudulent intent by facts that admitted of no doubt, and also, that such fraudulent intent, put into action, has operated to the injury of the complainant, then the statute has been useless. But such proof is not required. "The burthen of vindication is thrown on the contract," and the fraudulent intent

is presumed from any fact of an ambiguous character unusual or mysterious. "When experience has pointed out a successful engine of fraud, the very use of that engine is made to supersede an inquiry into intention."

The deed, says the court, in Twyne's case, hath these badges of fraud. First; it is general, conveying all his property without exception: *dolus versatur in generalibus*. Second; the grantor continueth in possession. Third; it was made in secret. Fourth; it was made pending the writ. Fifth; there was trust between the parties, and fraud is always apparelled with trust, and trust is the cover of fraud. Sixth; it declares that it was honestly and truly made; *clausulæ inconsuetæ semper indicant suspicionem*. For this reason it was resolved, that although there was a debt due to Twyne, and a good consideration for the deed, yet it was not within the proviso of the act of 13th Elizabeth, by which is provided, that said act doth not extend to a deed made on good consideration and *bona fide*, for although it was on good consideration, it was not *bona fide*.

The time and manner in which the deeds in question were made, afford as strong suspicion of their honesty, as the enumerated circumstances that were held to be fraudulent in Twyne's case. The assignment of June, it is true, was not of *all* the property of the grantor, but then the conveyance was not as specific in its terms as it might have been; and it is this generality and want of definiteness, that the court reprobates. It reprobates and treats as a suspicious circumstance, the fact of a general conveyance without valuation, and without communicating those facts, that parties dealing fairly, and for no ulterior view, would have disclosed. All the facts which will enable other creditors to see to what extent their debtor's property is affected, should be disclosed. It is on account of other creditors that any disclosure at all is necessary. Why then did not the bank disclose by the deed (which the law requires to be recorded for the purpose of notice,) a fact clearly within their knowledge, and which was essential to the creditors who might accept, and to those who might reject the trust?

I accuse the grantors in this assignment with the illegal intent of keeping under their own control, notwithstanding the grant, the property that they colorably parted with. I contend, that there are grounds to believe that the assignment of June was made with a view to that control; and I contend, that the proof thereof is infinitely stronger than the proof of a secret trust in the case of Twyne. The first fact from which it is inferable is, that the grantors, knowing the nature and amount of debts, did not disclose it in the assignment. The suppression of this information authorizes the inference, that they did intend to reap an advan-

tage from its suppression. If no schedule of creditors, or nature and amount of debts were made known, what prevented the bank from substituting others in the place of those who appeared to be, at the date of the deed, the beneficiaries of the trust? What prevented the bank, when she received, as it appears she did, after the creation of the trust, more than three hundred thousand dollars of the circulation secured by it, from re-issuing those very notes, as is the custom of all banks except the Bank of England, and thereby creating a new debt; and thus, even without the knowledge of their friendly trustees, creating new beneficiaries? But this was not the only power secured to the grantors by this suppression of facts within their knowledge. Had names and amounts been specified, *and the clause of condition omitted*, the creditors named for the amounts named, would have taken under the deed, not a power to attain an interest, but an actually vested interest, which would have precluded the grantors from closing the trusts before they were entirely paid. This the bank carefully avoided. The names and amounts, made part of the deed, would have taken from her the right to close the trust by paying off *those creditors who at the time she chose to exercise the right, had come in and proved their debts*. It would also have taken away the power of closing the trusts through the aid of the friendly trustees, by so directing the publication of notice to creditors, and their power to reject for want of proof of the claims offered, that the sum to be distributed at any given time, might have exceeded or fallen short of the *amount of the claims brought forward and allowed*, as might, on a view of the condition of the institution, be thought most for her interest.

But the counsel says, that there is authority, by decided cases, that authorizes *the withholding information of the amount and nature of the debts to be secured*; and he calls the attention of the court to the case of *Pearpoint v. Graham*, 4 Wash. C. C. Rep. 237. In that case the judge observes; "I do not understand the counsel to object to the validity of the assignment upon the ground of its giving a preference to the creditors who should release, or *for the want of a schedule*." This case, therefore, can be no authority on the want of schedules; for that, the court say, was not a point raised in the case.

The case of *Stevens v. Bell*, 6 Mass. 344, also quoted by the intervenors, affords no favorable authority. Ch. J. Parsons, who delivered the opinion, held, that the not furnishing schedules *at the time of the grant* was *prima facie* evidence of fraud; but that the presumption was rebutted in that case by a provision made in the deed that schedules were to be made out as soon as might be, and the debts, if disputed, were to be arbitrated. If the simple omission of schedules *at the time of the grant*, furnishes evi-

dence of fraud that requires such a provision in the deed to repel, what is to be said of a conveyance that makes no such provision, and which, from its nature and from its other provisions and its attendant circumstances, gave to the grantor, by this very omission, an almost unlimited power over the trust property!

All authorities agree, that the omission is not fraudulent, *per se*, and that where the omission does not give the grantor a power over the trust, *which he may exercise*, the omission, if the deed provides for supplying the deficiency, will be excused. Again, it seems to be the result of many cases, and amongst others of the case of *Wilt v. Franklin*, that where the conveyance is of *all* the property for the equal benefit of *all the creditors*, schedules may with safety be omitted. "Schedules," says the judge, "are a check on the fraud of the debtor, but are more necessary where part of a man's property is conveyed to a *particular creditor*, than when the whole is conveyed *for the benefit of all*." "I cannot find," says another of the judges, "*any positive rule of law* that imperiously demands a schedule to make valid a *general assignment*." "Even supposing," says the dissenting judge, "even supposing the debtor had a remaining interest after the assignment, yet *as he selected his own trustee, and the property remained in his hand for a time*, the want of an inventory gave him *the power*, without detection, to make use of the property after the assignment, and before it came to the hands of the trustee."

We here perceive the want of schedules connected by the two first mentioned judges, with the fact that the assignment was of *all*, for the equal benefit of *all*, and that provision was made by the deed, for an eventual conveyance of the property to such persons as the creditors might designate; for that was made one of the trusts of the deed. The dissenting judge we find, connected the want of schedules with the fact that the *grantor named his own trustees*—and that the property *must needs remain a short time in his hands*. He therefore was of opinion that these, taken together, gave him *a power over the trust property*. Now is it not obvious, that all the judges concur in the general principle, that where such omission *may confer* a power of altering the trusts, or closing them, or in any wise diminishing the operation of the grant, that the deed becomes void by such omission? It is not the omission of the schedules that, *per se*, is fraudulent, if it appear from other circumstances that no creditors can be affected or incommoded by the omission; but where that does not appear, and especially where it appears that creditors are, by the omission, deprived of information which they are entitled to, then the omission vitiates the deed.

A debtor in failing circumstances has a right to convey his property and to prefer one creditor over another; and he may, without vitiating the deed, occasion a delay of the legal remedies of other creditors *to an extent necessary to effect his purpose*; but if he delay them a moment beyond what is necessary, then the delay is fraudulent, and the deed producing it is void. The delayed creditors are not driven to judicial process to urge forward the trustees; they cannot be sent to a court of equity to ascertain a *residuum*, or told that they may sell this unascertained *residuum*; the statute cuts the Gordian knot, and declares the conveyance to be void. The creditors in such a case are not compelled to resort to a court of equity, even if equity could afford relief; and, as was said by Judge Van Ness in *Hyslop v. Clarke*, (14 Johns. Rep. 464,) "Whether they could obtain relief there or not, is quite immaterial in this case. An insolvent debtor has no right to place his property in such a situation as to prevent his creditors taking it *under the process of a court of law*, and to drive them into a court of equity, where they must encounter great expense and delay, *unless it be under very special circumstances, and for the purpose of honestly giving a preference to some of his creditors or to cause a just distribution to be made amongst them all.*" According, therefore, to the opinion of this learned judge, the only excuse for that delay which a resort to equity occasions, is a necessity to effect *some legal object* that could not be accomplished without so construing the deed that a resort to such tribunal becomes necessary.

What then is the complaint made, which a court of equity can as is said, remedy?

The first is; that the grantor, by not designating the particular debts secured by the deed, has made the interest granted uncertain; because other beneficiaries may be let in on the trust at the pleasure of the grantor. In reply it is said, that a court of equity will prevent it. I see not how that tribunal can prevent it. Suppose a creditor who has come in and proved, demands of the trustees an account of the trust; and, on the rendition of an account of the number and nature of the debts, the creditor should believe that it included notes and post-notes re-issued, and, therefore, not a proper charge on the trust; how is he to disprove the account? Whither is he to resort for information? How is he to prevent in any court, the appropriation of a dividend to those debts so improperly admitted? No creditor in his senses would undertake the task, for the litigation would be hopeless, and the trust, probably, brought to a close long before the close of his suit. But if there be a remedy for this, it is, as the judge said, wholly immaterial. No debtor has a right, *unless it be necessary to effect some legal object*, so to dispose of his property as to deprive

his debtor of his legal remedy and turn him over to the delay and expense of a court of equity.

But in what way could a creditor, a party to the trust, or a creditor rejecting the trust, ever make proper parties for an account of the fund? It is idle to say, that the trustees, themselves ignorant of the beneficiaries, would be parties to settle an account. No man's interest can be adjudged in any matter, who is not a party to the suit. It will be borne in mind, that the same reasons that, as Ch. J. Parsons tells us, determined the courts of Massachusetts to refuse to uphold trusts unless the *cestui que trust* was party to the deed, exist in the State of Pennsylvania. In that State, there are no courts of equity. "There is," says Ch. J. Tilghman, "no court of equity in this State, *even to compel the execution of a trust.*" (See Wharton's Digest, 621.) Statutes have from time to time been passed on the subject of trusts, but those statutes provide only for cases directly within their purview. In the case of June's estate, it was held, that the act of 1836 gave no jurisdiction of trusts created by will; and the parties had to resort to the legislature for relief. 4 Whart. 178.

But let us examine the act of 1836, which the counsel for the intervenors thinks possesses such ample powers. It requires only a moment's attention to the provisions of this statute to perceive, that no one, not a party to the deed, can have any relief under it, and that those entitled to relief can only have the specific relief given.

The six first sections contain provisions for making certain the property conveyed by the deed. They require a schedule—an appraisement, oath and bond.

For whose benefit is this? Is it for the benefit of one not claiming under the deed? What is the meaning of the clause that says *the bond shall be for the faithful performance of the trusts*, and that it shall enure to *the use of all persons interested in the property assigned*? Does it mean that a creditor who rejects the trust, may sue on the bond, and if it does not, what becomes of the argument of the counsel drawn from the words of the act, "*any person interested,*" may have citation against the trustees. If those general terms, when used in reference to the bond, would give rights only to those interested in the deed, by the terms of the deed, with what reason can it be urged, that the same words used in reference to the citation, would include persons who had come in and proved under the deed? I deny that any creditor wishing to avail himself of the *residuum* under the trust, would be entitled to cite the trustee for any purpose under this statute. If there were any doubt, that doubt would be removed by the eighth section of the act, that provides, that "no

such citation shall be issued until after the expiration of one year from the date of the deed or appointment of such trustee."

I cannot forbear to notice what the intervenors' counsel say of the power given by the statute in the twenty-eighth section, to make all necessary *orders and to carry the trust into effect*. They would have the court believe, that this clause gave the power to make all orders and decrees, in favor of those who assail the trust, and that too, *not for carrying it into effect*, but for the purpose of overthrowing it entirely. If the present plaintiffs had adopted the trust, what could this statute do for them? Could the court prevent the letting in of newly created debts on the trusts, which the grantor might have done in the mode which has been pointed out, or could the court prevent a closing of the trust or the numerous abuses and delays that the deed enables the grantor and the trustees to effect?

In the case of *Hyslop v. Clarke*, 14 Johns. Rep. 459, the court says; "The deed contains provisions that render the whole, in the judgment of law, fraudulent and void. It does not actually give a preference, but is in effect an attempt on the part of the debtors to place their property out of the reach of their creditors; and to retain the power to give such a preference at a future time. One object is to coerce the creditors to acquiesce in the terms offered to them." The power to change the trust as created, was the ground on which this deed was avoided. No inquiry was ever instituted as to whether the power was actually used, or whether the character of the parties was too pure to be suspected of fraud. It was sufficient that the deed did not devote the property to the payment of debts beyond recall, but left to the grantor the power to change the trusts. And is there, I ask, any difference in principle between that case and the present? In that deed, the power to change the trust was expressly reserved; in the present case, it is secured by a suppression of information that an honest purpose would have led the makers of the deed to disclose.

The counsel for the intervenors are mistaken in supposing that under this statute, proper parties could be made to a decree settling the proportion which, on a final closing of the trust, each creditor has been entitled to.

In all legal controversies, the first question is, who are the parties? Now, if a creditor should to-day file a bill to ascertain his interest in the trust, it would be material for him to know who are interested with him. If it be those who have come in and proved, then there is no difficulty in the case; but if it be those who may at any time, hereafter choose to come in, then the difficulties are insurmountable. It in no respect aids him that the trustees represent *the creditors*, for the question occurs—what credi-

tors? The trustees themselves cannot tell, for their names are not given, and all information approaching to certainty must be gathered from the grantors who may give such as suits them.

But I deny that the trustees do or can represent creditors, *cestuis que trust*, in any controversy between each other to settle the rights of each under the deed. All interested must be made parties, and if the aggregate of the creditors are interested, then there is no court under heaven, that can finally determine the interest that any one may have in the fund. The authorities show, that the trustees represent the creditors in suits brought by them to support the legal title, and also in suits brought against them wherein that legal title is defended, but not so when a controversy arises as to the interests of the *cestuis que trust*. Then all must be made parties either plaintiff or defendant. This may be done, says Judge Story, in some cases, by a creditor bringing his bill in behalf of himself and all the other creditors who may choose to come in and take the benefit of the decree. The principle, however, is correct, that all having claims under the deed, must in some way be made parties.

Now, let us suppose a creditor to file a bill for himself and others, what decree could be made by the chancellor? If he supported the deed, he must establish all the rights created by it, and one of those rights would be a trust of all the property for the benefit of the grantor, on the payment of all who at any time might come in. This single creditor therefore, suing for himself and others who might choose to come in, would bring the trusts to a close, and the chancellor, without making a new deed, and changing the rights of the parties, could not let in any other creditor under the decree, for the deed is express in its terms, "that from thenceforth no creditor shall have any rights on the remaining property conveyed, but the same shall be held by the trustees for the grantor." The condition of the creditor who rejected the trust would be equally deplorable. He could not file a bill without making all claimants under the deed parties by name. He could not file a bill for himself and others, for there are no others standing in his situation. The rule, says Judge Story, Eq. Plead. 104, "is to be understood with this limitation—that the bill is not filed for some particular interest of the plaintiff; but it is one where all the creditors have a common interest with him in all the objects of the bill." Again, p. 151; "Where priorities are to be ascertained, asserted by those claiming *paramount* to, and not in virtue of the assignment, all the creditors, entitled under the assignment, should be made parties by name to the suit, however numerous they may be, since each is or may be interested in ascertaining or repelling the claims and charges of all others." I shall, however, close this part of the case by re-

minding the court, that the question is, not whether a remedy is afforded the creditors, but whether, *to effect a legal object*, the creditor has been put to delay, trouble and expense.

And now I think I have established—

First; that the statute of Elizabeth and the decisions under it form a system of rules for the suppression of frauds, and that the inquiry in any given case is not so much the priority of interest, as whether the conveyance has those evidences of fairness that fraud cannot assume.

Second; that a conveyance *with a view* to delay the *legal remedy* of creditors, ascertainable from the want of those badges, or containing limitations unusual and mysterious, is fraudulent.

Third; that a deed which, either from omission or other causes, gives the grantor the power to delay the legal remedy, vitiates the deed, even though the power be not used. And,

Fourth; as examples of deeds fraudulent within the act are those where the grantor either directly by the deed, or indirectly through the trustees, may change the beneficiaries or has the power to close the trusts, or in any way recall, on any contingency, the property devoted to the payment of debts,—and also such deeds as do not enable the parties, both those who accept and those who reject their provisions, to ascertain their respective rights, or which, without sufficient cause, withhold information essential to be known, and which was in the power of the grantor to communicate.

I shall not again advert to the deeds. It requires but a slight survey to perceive that they are obnoxious to all the objections above laid down. No one, who attentively considers their provisions and what might be their operation, can escape the conviction, that the deed of June was never intended to be executed. In the language of one of the witnesses, “we thought the creditors would be satisfied.” We thought that under its specious cover we could quiet the solicitude of our creditors, and be permitted to manage our business in our own way for our own benefit.

I turn to the case of *Wilt v. Franklin*, on which, the counsel for the intervenors tells us, he relies with undoubting faith. This case, although the dissenting opinion of Brackenridge, J. is probably the law of it, and although it has been in some points overruled by a decision of late date, (see 5 Whart. Rep. 345,) yet, when examined, is found to contain nothing that sustains a principle that would uphold deeds like the present,—that places property on interminable, uncertain and shifting trusts. Keely, finding that a judgment was about to be entered up against him, executed a deed of all his property for the benefit of all his creditors. In this object we see a meritorious motive. He was unable to pay all, and therefore, determined to distribute what he had equal-

ly amongst them. Had he been actuated by any other motive—had he attempted to create a preference—even though the doing so was a legal right, the deed would have been void. It required all the merit of this motive to save the deed from the imputation of fraud; for although none doubted the purity of his purpose, yet the means by which he carried it into effect cast suspicion on the deed. The principal cause of suspicion was the fact that the property remained in his possession for a time; and the deed contained no schedules. This, as was said, gave him power to appropriate the property or a portion of it. It was replied, that the deed provided for making the schedules without delay—those schedules were without delay executed, and the trustee took possession without delay, and transferred it, as directed, to a trustee chosen by the creditors. Here then, we have a case where the strongly marked purpose of creating equality amongst creditors excused the delay of the legal remedy on the judgment. Had the grantor created preferences—had he assigned part of his property—had he encumbered the deed with discretionary powers to the trustees, and contingent powers to himself, it would not have stood the test of a moment's examination.

The counsel for the intervenors contends that a debtor, in failing circumstances, has a right so to dispose of his property towards payment of his debts *as to have in view* the preventing of a sacrifice, and that this is the peculiar duty of corporations, as the lives of these institutions perish with their credit. No assertion could be made more directly in hostility with the principle of the statute of the 13th Elizabeth, and more directly at war with every principle of honesty and justice. The duty of making payment when the debt is due is an immediate duty, and cannot be postponed on any consideration; and it was to prevent those delays, that this statute was passed, to give greater efficacy to the common law, which, before the statute, pronounced, as does our law, such delays to be fraudulent.

Whether the debtor be solvent or insolvent, is immaterial; if the deed be made with a view to gain time in order to preserve the property from sacrifice, it is wholly void. The counsel seems to think, there can be no *delay to a creditor* unless there be an interest in the grantor. This is a great mistake. An interest in a grantor is evidence of an *intent* to delay; and it is only because evidence of such intent, that it vitiates the deed. For the statute does not declare that such reservation shall make the deed fraudulent. So, in like manner, any omission from the deed or any clause in it, that appears to be designed to *delay creditors*, will vitiate the deed, for that is what the statute inhibits.

In the cases of *Ward v. Traller*, 3 Monroe's Rep. 1, and *Ver-non v. Martin*, 8 Dana's Rep. 247, the intent to hinder and delay

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creditors was derived from declarations in the recital of the deeds, viz: "that being in embarrassed circumstances the grantor, *to prevent a sacrifice of his property*, assigns it for the benefit of his creditors." Now, in these cases, there was no interest resulting to the grantor; for his embarrassments were such, that he declares the property will only be sufficient to pay his debts by being preserved from sacrifice.

The intervenors' counsel, speaking of the suits brought by creditors after the June trust, asks—what does it prove? And then replies: "not that they rejected the security already given, but that being completely unrestrained by the June deed, as to the other property, they sought additional security by obtaining the liens of judgments and executions against the assets unassigned." Now what greater proof can there be of the rejection of a deed by a beneficiary, than his voluntarily placing himself in a *situation* that, after the act is done, he can by no possibility have any claim under the deed? This is the condition of every creditor who has sued his claim to judgment. The debt, by deposit, note and post-note, merges in the judgment, and becomes a demand, of which the trustees can take no notice.

The facts in this case are, that the property attached was debts owing to the Bank of the United States by debtors residing in this State, which were evidenced by written obligations made payable here; which written obligations always remained in this State, except for a period of time, and for a purpose that is fully shown by the record. This removal of the obligations was made after the bank was in failing circumstances, and was for the avowed purpose of taking measures to prevent the effect of the laws of Louisiana. The question then arises, whether the creditors of the bank, who claim a lien on this property through the trustees, *by virtue of assignments they made*, or the creditors who claim a lien by virtue of the attachment, have the better right. For the claimants under the assignments, it is contended, that they are elder in point of time; and therefore, better in point of right; that the law of the place where the assignment was made ought, by comity, to govern the case, and mete out the extent of the rights of those who claim under it. The attaching creditors, on the other hand, contend, that the owner of property situated in Louisiana, residing abroad, cannot exercise acts of ownership over it to a greater extent than he could if he were a resident of the State; that this results from the positive precepts of our code; that comity will in no case adopt the principles of foreign laws in the regulation of property within our jurisdiction, contrary to the principles of the law by which it is protected.

Let us examine our code, and see whether the rights of an owner of property of any kind, situated in this State, is not con-

trolled by our laws, wherever the owner may chance to reside. "Ownership," says our Code, art. 480, "is the *right* by which a thing belongs to some one in particular, to the exclusion of all others." Art. 483—"It gives the *right* to enjoy and dispose of one's property, in the most unlimited manner, provided it is not used in a way prohibited by laws and ordinances." The same article then adds—"Persons who reside out of the State cannot dispose of the property they possess here, in a manner different from that prescribed by its laws." The words "*in a manner different*" apply not to the *mode* but to the effect of the disposition made of the property. This is in perfect coincidence with art. 10. The form and effect of instruments are governed by the laws and usages of the places where they are executed. As to the *form*—in all cases; and as to the *effect*—in all cases except where they are to have effect in *another country*; then their *effect* is to be regulated by the laws of the *country where they are to have effect*. Then follows an exception to the rule that the law of the country where the contract is to have effect governs; and that is, where a foreigner or citizen of another state *disposes of moveable property situate in this State, by will*, if at the time of making the will, and at the time of his death, the testator was domiciliated out of this State. No owner of property situated within this State can, by residing out of the State, exercise a greater control over it, or convert it to other purposes, than he could if he resided within the State, with one single exception, and that is when permanently residing out of the State, he makes a bequest of personal property. The ninth article of our Code declares, that the laws are obligatory upon all the inhabitants of the State indiscriminately; the foreigner residing here, *and his property within our limits*.

This plain and perspicuous legislation relieves us of the embarrassment of an inquiry which no jurist of modern times has entered upon, without declaring an inability to reconcile conflicting authorities, or to adopt any general principle to give system or symmetry to the confusion that everywhere prevails. The inquiry is this; whether the law, which declares that the property of an embarrassed debtor shall be a pledge for the equal payment of all his creditors, is a real or personal statute. The rights of ownership exercised by the bank in making these assignments, are not such as could have been exercised by any person residing under our laws and owning property here. By our law, no debtor, whatever be his circumstances, can, without the consent of his creditors, create a trust that will bind his property. Arts. 1963, 1964, 1979, 3149, 3150, 3125 of the Louisiana Code in substance declare, that all the property of the debtor is bound for his obligations, and that in case of his inability to pay, all of it shall

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be a general pledge for the benefit of his creditors; and to insure this, all acts done or omitted which divert property from these objects, are declared to be fraudulent. The same intention is manifested in subsequent legislation. The laws relating to the surrender of insolvent estates, deprive the debtor of the benefit of those acts if he has attempted by any act to give a preference to one creditor over another. See Digest, 241, 251. 13 La. 554. If the position, that the rights of an owner residing abroad, over property situated in this State, are not greater or different from the rights of an owner residing here and having property here, be a correct position, and if it be true, that no owner of property residing in the State could exercise his right of ownership so to dispose of his property as these assignments endeavor to effect, then, if it be established that the property conveyed was, at the time of the conveyance, situated within this State, the conclusion cannot be resisted, that the assignments are void.

It is said, that jurists have generally assented to the doctrine that moveable or personal property has no *situs*, that it attaches to the person of the debtor and is regulated by the law of his domicil. This proposition can never be sustained in the State of Louisiana. If the property be here our laws must govern the *jus disponendi*, because the ownership is declared expressly to be subject to our laws, and to this there is but one exception; and that is, in the case of a mortuary bequest of personal property. This has been so repeatedly decided by our courts, that it is matter of astonishment that it should be doubted.

In the case of *Olivier v. Townes*, this court decided that personal property within this State is governed, not by the laws that regulate the person of the owner, but by the laws of Louisiana, where the property was at the time of the sale. The counsel for the intervenors inform us, that our Code, art. 10, expressly recognizes the principle, *mobilia sequuntur personam*, and enables a father, residing in England, to distribute his moveables within this State, without regard to the rights of his children, which could not be done by the law of the place of their *situs*. This allusion to art. 10 is very unfortunate. When examined, it is found to be, *not a rule, but an exception, which proves the general rule to be exactly the reverse*. A person owning moveable property in this State, may dispose of it according to the law of his domicil, *by will, and in no other way*. He must, at the time of making the will, and at the time of his death, not only reside, but be domiciliated abroad. In no other event can he dispose of his personal property here, except as directed by the laws of our State. Under all other circumstances, the general rule, to which this is an exception, must prevail, and that general rule is laid down to be, that his ownership, and all

contracts to have effect on the property, shall be governed by our laws.

Several cases, says the counsel, are to be found in our reports, where a sale of moveables, *being within our State* at the time of the sale, has been held not to transfer the property, although the transfer was complete by the law of the domicile of the owner; "but the reason was, that our laws required something more to be done, than was done, to consummate the contract as to third persons. On the other hand, where the contract requires nothing more to be done to consummate it as to third persons, the contract will be enforced, even though tainted with a fraud that, by our law, would be a ground of nullity." Now, is it not evident, that if a contract of sale made according to the laws of the owner's domicile, is not permitted, by reason of our law, no matter for what purpose, to transfer the property, our law, by not permitting it to do so, refuses to recognize the principle—*mobilia sequuntur personam*? Is it not obvious, that in such case, the property is governed by our law, and not by the law of the owner's domicile?

But it is said, that the court has given effect to a contract of sale of property made out of the State, which, if judged by the laws of our own State, would be entirely void. This is true; but a material fact is not disclosed; *It was a sale of property not within the jurisdiction of our State at the time of the sale.* This omission makes all the difference between the case of *Olivier v. Tynes*, and the case of *Thuret v. Jenkins*, which the intervenors' counsel cites. The property sold was not at the time of the sale within this State. This is the great and decisive fact. Judge Martin understood it to be so, when he declared "that the *chattel being afterwards brought into this country would not affect it.*"

The case of *Norris v. Mumford* again lays down the rule, that property within this State is governed in its transmission by the laws of this State, and not the laws of the domicile of the owner. The case of *Ramsay v. Stephenson*, which affirms the same principle, denies expressly that our courts can or will, in applying the law, be governed by the fact that our own citizens alone are concerned in its application.

In that case the court held, that the property being in this State, those laws would be applied for the benefit of any who invoked them. That this is the principle, and no other, is evident from the case cited by the intervenors' counsel, *Thuret v. Jenkins*. The controlling fact in that case was, that the property at the time of the sale was not in the State. The parties were all of them citizens of New York.

The case of *Chartres v. Cairnes* is relied on by the counsel

for the intervenors, as overturning the long train of anterior and subsequent cases that assert the jurisdiction of our laws over all property within our limits. The case is not satisfactorily reported. The question of law appears not to have been argued.

The fact is not made certain that the property conveyed was here at the date of the conveyance. But I submit to the court, whether a case can be considered authority on a point when it does not show that that point was made by counsel, and deliberated on by the court. The opinion discloses to us, that the only point of deliberation was, whether the assignment was good according to the laws of New York. It can only be an authority for that and nothing else; and what degree of weight it ought to have, even on the point decided, it is not difficult to estimate. However this may be, the case can be no authority for what it does not pretend to decide; and I think the court will agree in believing, that it has little weight as to what it does decide. For on a question of foreign law, it disregards *the authority of every decision* that was ever made in the State of New York, the laws of which are said to govern the case; and also disregards a direct decision on the very assignment made by the Chancellor of that State! The court of chancery is denominated an *inferior court*. It is true, there is an appeal to the Senate of the State, sitting as a court for the correction of errors,—but in that sense, the Supreme Court of that State is also an inferior court, as are also the Queen's Bench and the High Court of Chancery in England.

The case of *Layson v. Rowan* is not, as the counsel supposes, a case where the property conveyed was within this State at the time of the conveyance.

I say, therefore, that there is no well attested case—no case of any authority that goes to establish as law, the proposition that personal property within our State, will, by a fiction of law, be presumed to be where its owner may chance to reside, and subject to the law that controls him. Was it by accident or mistake that the court declared in the case of *Barns v. Patten*, “that as relates to the rights and remedies of creditors, personal property has a *situs* or location, and is governed by the laws of the country where it is situated, when there arises a conflict between the latter and the former?” Did they really mean nothing by it? The counsel says, that the plaintiffs were citizens of Louisiana. They were so in truth, but I cannot comprehend how this fact could change or alter the proposition, that personal property has a *situs* for payment of debts. If it be true at all, it must be true wherever parties litigant may reside, or whether there be any litigation about it or not. There is no authority for the opinion, that the court can determine that the property has or not a *situs*,

wherever the residence of the plaintiff may happen to be. It is a law of the code.

The counsel for the intervenors being driven to admit, that the law of the domicil of the owner is not permitted by our law, to affect property within our jurisdiction, when brought in conflict with rights created by our laws, contend, that although the law of the code, *which prescribes delivery as essential* to the contract of sale where the interests of third persons are concerned, *will be enforced*, so as to prevent the operation of the contract, where such interests exist; yet, that it does not follow, that the law of the code which *prescribes equality of payment* amongst the creditors of an insolvent debtor, and to that end prescribes that his property shall be for them *a common pledge, will also be enforced* so as to prevent the operation of any contract, the force and effect of which, if left unchecked, would overthrow their provisions. He offers no reasoning in support of this proposition. He relies, it is true, on a case, but that case I have shown, does not support the proposition, for the sale in that case *was of property not within the State*.

Now, if it be true, that our law which prescribes delivery, is enforced against contracts made elsewhere, so as to limit the effect they would otherwise have, *for the reason that the property affected by them is within this State*, it seems to me, that any other law affecting contracts generally, or prescribing generally what rights an owner may exercise over property, will in like manner be enforced against contracts elsewhere, so as to limit and control their effect, if the property affected be within the limits of the State. Courts have not a discretion to say that some laws shall be enforced and others not. It is said that the law of delivery was made for the protection of our citizens against fraud, (how erroneously has been shown;) if so, were not those various precepts of the code, regulating the duty of appropriating property to debts, also made for the purpose of protecting the citizen? Weigh the two laws together, and what can be found in the one, not in the other, which should entitle it to be enforced to limit the effect of foreign contracts, and the other to be disregarded, on the principle of comity? I can perceive nothing. The reasons on which both are founded are similar. The utility and moral results of the latter appear to me far greater than the former. That the laws against preferences are not of a local nature, and to be restricted to our own citizens, is evident, from the case of Andrews. He was refused the benefits granted to insolvents, because he had given preferences even in a State where it was lawful to do so. These acts of his in regard to his property were regarded as *against a vital principle of our system*; and although

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justified by the law of the place where they were done, yet created a forfeiture of rights that our laws otherwise gave him.

It seems to me, that no lawyer at all acquainted with the principles of our legislation, could so far mistake them as to assert, that a conveyance of property situated in this State, could be made by a non-resident, giving fraudulent preferences, or that our laws would carry such act into effect. To permit this to be done, would give to the non-resident, rights of ownership more extensive than are the rights of resident owners. It would be permitting him to do effectively, that which is in contravention of a *prohibitory* law. It would be declaring that property within our jurisdiction is not subject to our laws. It would finally be deciding, that our own laws should carry into effect a contract which was intended to have its effect here, which contract, our laws, that render it effective, stigmatize as a fraud on one of the vital principles of a system regulating property in regard to debtor and creditor!

"The rule that personal property has no *situs*" says Judge Story, "determines, as a consequence flowing from it, that the laws of the owner's domicile shall in all cases determine the validity of every transfer, alienation or disposition made by the owner." The reason of this rule, says the commentator, is, that if the law *rei sitæ* were *generally to prevail*, owners, in many cases would not know in *what manner* to dispose of their property during their lives, or to distribute it at their death; from the uncertainty of its situation, and ignorance of the laws of transfer and succession in different countries. Now, when the commentator declares that the *validity* of every transfer shall be determined by the law of the owner's domicile, he evidently does not mean that the *operation of the contract* shall be determined by that law. This is not the meaning; but only that this constructive *situs* shall enable him to convey his ownership in the *mode* allowed by the law of his domicile to persons and to uses permitted by the laws of his domicile: but to what extent those uses may be abridged by counteracting rights, must be determined by the law where the property may happen to be.

This principle is illustrated in the distribution of personal property. It is to be distributed according to the laws of the State where the testator dies, on the ground of its being the presumed will of the deceased, that his estate shall descend to the person whom the law of his own country calls to the succession. The title of the distributee is as *valid* as that of a purchaser, but the extent to which his title *operates* is subject to the law of the place where the property is. He cannot be permitted to assert his title in any way to get clear of the duties that the law which protects the property, has imposed upon it. If there be debts,

those debts must be paid, and their nature, extent and priority will be determined by the law of the *situs* and not by the law of the deceased debtor's domicil. Let us suppose that the deceased resided in the State of New York, and that he died intestate as to his personal property, having made a will of his real estate, and imposed on it the entire burthen of the payment of his debts, and let us suppose that those debts were prescribed by the statutes of New York, but not so by the statutes of Louisiana. The distributee, whose legal title is unquestionably *valid*, seeks to assert that title on the moveable property here. To what extent would this *valid title operate* by our laws? We would not give it the same operation—the same force and effect that would be given to it by the laws of New York. There, the distributee would demand of the executor the entire personal property, because not only the debts were beyond recovery by suit, but because, the real estate in the hands of the instituted heir was exclusively charged with their payment. Not such would be the effect of his title here. Our law, which declares that the debtor's property is liable for his obligations, would take care to enforce the duty, and no matter if they were beyond recovery by the law of the decedent's domicil, and no matter that the decedent had provided funds for their payment, the distributee would not be permitted to remove the property from the State, until all the debts were paid that were existing debts according to our law, and that, not only to our own citizens, but to all who being citizens of the United States, asked the aid of our laws.

The law of the domicil, therefore, that determines the *validity* of the transfer, does not necessarily determine its operation or direct effect. The manner of the transfer is *usually* determined by the law of the domicil, but the *effect* it shall have—the extent of the rights conveyed, must be taken subject to the law of the *situs*. In all countries where the law does not declare that the rights of a non-resident owner shall not be greater than that of a resident; and in all countries where the law is silent, as to the effect of *situs*, foreign contracts are to be governed by those rules of comity which have been generally sanctioned, and which will be noticed hereafter. Judge Story, in the very paragraph that lays down the rule of domicil, states also in general terms the exception, viz: "unless there be some positive or customary law of the country where the property is situated providing for particular cases." Here again he is evidently speaking of the *effect*. Unless, he says, there be some law providing a particular mode. He admits that such prescribed mode must prevail. Every country has the right to regulate the transfer of property within its dominions, and it is only when no positive regulation exists, that the owner transfers it at his pleasure. So it is equally true, that the

sovereign may declare the force and effect of the rights growing out of the transfer, and on what conditions those rights may be exercised. This has been done by the State of Louisiana. *She has declared, that the ownership of property within her dominion shall never be so exercised as to withdraw it from the duty imposed on it by law, of paying the debts of its owner equally, no matter where the owner may reside. The fiction of the law of the domicile cannot abrogate or impair this law. Nor does this rule operate harshly, nor induce any of the consequences that the origin of this fiction was intended to prevent; for she has also provided, that the form of all contracts shall be governed by the laws where they are made, and that the effect, with one exception, shall be governed by the law of the place where they are to have effect.*

The counsel for the intervenors argue, that the property attached, being incorporeal, must be considered to be property in the possession of the owner, and not where the debtor resides, for reasons peculiar to that species of property. These reasons are there set forth, and may, I presume, be reduced to the following propositions:

First. A debt is property in possession of the creditor; because, in case of sale, the delivery of the title is, *by law*, made equivalent to a delivery of the debt.

Second. It is *property in possession of the creditor; because it can only be sued for where the debtor is found; and can only be transferred where the owner is found.*

A debt, considered as property, can, independently of any fiction, be no where else than in that place where the debtor resides; because it is neither more nor less than an amount of property which the creditor has placed in the hands of the debtor, which the debtor, on a given day, has agreed to return *in numero*. It is said to be property *in action*, not in possession; because the possession being given up for a time, the creditor, whilst he awaits the time he has given for its return, has only a demand, and that not one he can insist on until the time for return arrives. The evidence which the debtor gives to the creditor of his right to have a return of his property, is as different a thing from the right itself, as is any other evidence of right different from the right it evidences. To confound the one with the other is confounding things entirely separate; and although laws may declare that the parting with this evidence of right, under a contract of sale, shall be evidence of a delivery of the right itself, yet that does not make them the same thing, but proceeds altogether on the idea that they are different, and that it requires a law to make them one for a particular purpose. Were a law to declare that a delivery of a bill of sale of a horse should amount to a de-

livery of the horse, it would not be a correct conclusion that the bill of sale was a *horse*, or that its owner, having the bill of sale only, could be said to be in possession of one.

Civilians place debts in the same condition as other moveable property,—that is, they consider them as following the person of the owner, and as a *general rule*, governed by the law of his domicile. I am not aware that any distinction is made, founded on a duality of sense in which it is said that they may be considered, nor do I see any reason for this *active and passive* view of their nature; for if they are personal property, as confessedly they are, then they are embraced in the fiction that they have no locality; and the counsel ought to have remained satisfied with placing them in that category. Whilst I admit, therefore, that there is the same reason for their being considered under the law of the domicile of the owner, as there is for placing any other moveable property under that law, I at the same time contend, that there is not *greater reason*, and that if the fiction does not, in our State, apply to tangible moveable property, it does not apply to incorporeal property.

That debts are the creditor's property *in the place where the debtor resides* is, as has been said, evident from the law governing attachments and executions. It is also evident from all laws that give rights or create duties, depending on the fact of a person owning property in a particular place. For example, the fiftieth article of the Code says, that where a person residing abroad, having property within this State, moveable or immoveable, and no person here to represent him, *the judge of the place where the property is, shall appoint a curator*. Now, suppose the absentee has no other than debts due him, and that he has in his possession the evidences of the debts, would it for a moment be contended that no curator could be appointed? Would any lawyer say there was no property here, because by fiction of law all property followed the person of its owner? Or that the absentee, having the evidences of the debt, must be presumed to have in possession the debt also? The law that requires a surety to possess property in the parish where he offers to become bound, is complied with by his having demands against persons residing in the parish. And on the other hand, his possessing demands against persons residing elsewhere, is no more a compliance with such law than would be his owning property in France or England.

The following propositions, then, I believe to be established:

Debts are property in the place where the debtor resides. They are no more subject to the fiction of having no *situs*, than any other species of moveable property.

Moveable property of all kinds has, by the laws of Louisiana,

a *situs* for the payment of debts. It is subject to our laws, if within our jurisdiction. The rights that its owner may exercise over it are not greater than the rights which a resident owner may exercise over his property. That as a resident owner could not convey away his property in disregard of the duty of equal distribution amongst his creditors, so, in like manner, a non-resident cannot make such a conveyance.

This closes all that is necessary to the present point in this case, which is the only point I intend to discuss. But before closing, I shall offer a few observations on the maxim that the *lex loci contractus* governs the validity, obligation and construction of the contract. This rule seems to have been confounded by the counsel of the intervenors, with the maxim that personal property has no *situs*. Whereas the latter, in those countries that adopt it, had its origin in the convenience of a known rule in the transmission of titles, whilst the former is a rule of construction and interpretation of contracts that come before our courts for adjudication arising in some other country, without regard to the *situs* of the subject matter.

It would be giving to the fiction of domicile an influence not heretofore claimed for it, to say that it emancipated moveables entirely from the legal control of the law of the place where they may happen to be. We have seen, that the law requiring delivery in contracts of sales, although a law in general terms, and not expressly declared to be applicable to property owned by foreigners, has, nevertheless, been applied to them; and it has been shown, satisfactorily I think, that the law, requiring equality of payment, a law of infinitely more importance, cannot fail to be made applicable to foreign owners, as well as to our own citizens.

To what length of injustice might we not be driven, if all the moveable property here, owned by foreign residents, should be considered at once, and by force of a fiction of law, removed beyond the ordinary laws that regulate the rights and uses of personal property? A better illustration of absurdity and injustice cannot be given than this case presents. The bank, by permission of our laws, comes into this State and deals with our citizens, contracts debts to an immense amount, and becomes the owner of property to an immense amount. Being unable to pay, she, by an officious and unauthorized agent, in order to elude the duties which insolvent circumstances had impressed upon her property, secretly carries away the *evidences* of it; and when they are brought back, in the custody and control of the same person as before, they are, as is said, sacred from execution. Such is the influence of a few months of absence; such the effect of a short excursion to the north! The creditors are told, it is in vain

to strive; our property is shielded by the protection of foreign laws. Your actions are paralysed; and to use the language of the counsel, placed under the panoply of *a stay of proceedings*.

It seems that if this can be done at all, it might have been done without carrying away the evidences of the debts. They were not necessary to effect a conveyance of them at common law; and if the principle contended for be correct, that the law of the domicil of the owner governs all conveyances made of property owned here by those whose domicil is elsewhere, what prevented a conveyance, without taking away the bills and bonds from the place where they were made payable? Nay, what prevents the thousands of traders who throng our city, and whose domicil is at the north, from conveying away their property so as to create an inequality? If the principle contended for be correct, they may do it at any time; and will be justified by the fiction, that moveable property is governed by the law of the domicil where such conveyances are permitted.

No court would hesitate at once to condemn such evasion. What cannot be done in a direct way cannot be accomplished by indirection. If it were necessary, innumerable authorities might be adduced. Questions arose in the courts of New York as to the effect of divorces obtained by the citizens of that State in the State of Vermont. By the laws of the latter State, a very short residence entitled any person to sue in their courts for a divorce, and such was the liberality with which they were granted, that no one sued in vain. Thither resorted, from neighboring states, and especially from New York, pilgrims of both sexes, to obtain relief from domestic afflictions; they came in grief and departed in gladness. The courts of New York, however, when those cases came before them, arising on questions of property affected by such divorces, pronounced them to be frauds on the laws of the State of New York; and in all cases where the citizens of that State had gone to Vermont to reside, *with the intent to obtain the relief of their laws*, the divorce was held to be entirely void. This was upholding a proper principle. It was vindicating their laws in a proper manner. It administered a proper rebuke to the artifice by which they were attempted to be eluded.

The validity of a contract includes the capacity of the parties to make it; the voluntariness of the assent between the parties, and the lawfulness of the effects to be produced by it. "*Generally speaking*," says Story, "the validity of the contract is to be determined by the place where it is made." All those qualities, therefore, included in the term "validity," must, *generally speaking*, be governed by that law.

The court will perceive, that the *lawfulness of the effects to*

be produced by the contract, is the point to which attention should be directed. This quality, if I may so call it, of the contract, is distinguishable from all others I have named and is also distinguishable from the nature, the obligation, and the interpretation, which this author says are also, *generally speaking, to be determined by the lex loci*. Whether a contract be personal or real, conditional or absolute, are questions concerning its nature. Whether a contract confers a right to performance, and on the other hand a duty to perform, are questions touching the obligation. For example; if a contract, by law, when made, can only be recovered on condition that payment is first sought of some other; the obligation of such contract would be accessorial, and such law qualifies *the obligation of the contract*. Whether a contract shall be considered as having one meaning or some other is a question touching the construction of contracts.

The lawfulness of the effect sought to be produced by the contract, is that quality of it to which attention should be directed. The intervenors say, we have become the grantees of the property attached, and the effect which we seek to produce by that contract is to effect an unequivocal distribution of the property conveyed amongst creditors; that effect is lawful by the laws of Pennsylvania, and as the *lawfulness* of the effect to be produced by the contract is to be judged of by those laws, it must be held lawful in Louisiana.

Now the answer to this is obvious. *The lawfulness* of the effect to be produced by the contract is not called in question, when its effects are limited and held to be subject to the rights which our own law gives to creditors. *The lawfulness* of an effect, and its *extent*, are quite different things. Effects which result from the *nature* of the contract ought not to be confounded with those circumstances purely *accidents*, which limit their operation. The former, generally speaking, are governed by the *lex loci*, the latter by the *situs* or locality of the thing. The heir, or distributee, who demands property by the title of succession, has not the *lawfulness* of its effect called in question, when the property so claimed is held subject to the payment of debts. *Boulenois*, as reported by Story, informs us "that errors arise from confounding *the effects* that result from the nature of the acts on the one side, with those which belong to the charges or liens which spring up after the acts, purely as accidents on the other side." "And another error is the omission in a proper case to have due regard or deference to the law of the *situs* or locality of the thing."

Mævius, as reported by the same author, also distinguishes between the effects of the contract and accidental extrinsic circumstances not in the contract. *Cave autem hac materia, confundas actuum et contractuum solemnia, nec non effectus ac ip-*

sis causatos cum eorum onere, et accidenti extrenseco quod contractus subsequitur, sed ex non ipsis contractibus est. Id, dum multi ignorant, aut non discernunt, forenses maxime laedunt, et gravantur." His opinion therefore is, that the place of the contract is to govern the solemnities of the contract—the effects caused by it; but as to the charges on it, and the extensive circumstances that may limit these effects, they are to be governed by the law of the *situs* or the law of the place where the contract is to have its execution and effect.

But another answer is to be found in a well recognized exception to the rule that the place of celebrating the contract governs *all the effects sought to be effected by the contract*; and that exception is, that where the contract is made to have effect in another country, it is to be governed by the laws of the latter country. I need quote no authority to prove this exception. It is not only recognized by civilians generally, but is one of the precepts of our code, and has been recognized by decisions of this court. Indeed, it seems not to be controverted by the counsel for the intervenors, but on the other hand, an attempt has been made to show that these arrangements were not to have effect here.

The counsel says, that the assignments were not only made in Pennsylvania, but were entirely closed and consummated there; that their execution was simultaneous with their existence. Now in this he is entirely mistaken. If he would look at the nature of the arrangements, he will find them to be *executory trusts*, and so denominated in all the books. That the effect they were to have was secured by executory covenants some of which were expressed, others implied. They could be executed so far as property here was concerned by having effect here. The trust to hold and preserve the property, and collect it, were effects of the contract, directly contemplated by the contract; and these could take place only in Louisiana. It is not, as the counsel supposes, the completeness or the incompleteness of the contract that is the test, but where it is to have effect.

A bill of exchange drawn here, payable in New York, is complete—it wants none of the parts of a contract, and yet the laws of New York, not of this State, will govern. Wherein does this case differ from that of *Beirne & Burnside v. Patten*? The property claimed by the trustees was here at the time of the assignment, and the garnishees had received notice of the assignment. Might it not have been said, that, by fiction of law, the property was at the debtor's domicile when the arrangement was made, and that, as the assignment transferred the property and was complete at the instant it was made, therefore, it was not to have effect here? Yet the court say, in a case where all this might have been urged with as much force as in this, the proper-

ty being here, the contract in relation to it was to have effect here. "It is a well settled rule that where a contract is, either expressly or impliedly, to be performed in another place than that in which it is made, its validity is to be governed by the law of the place of performance."

But another answer may be given to the claim set up by the intervenors, *that all the effects sought to be obtained by the assignments* should be governed by the laws of Pennsylvania, and that is, that the effect sought to be produced of an unequal distribution of the property of the bank amongst creditors, is contrary to the express laws of the State of Louisiana, and, therefore, to carry into effect the preference created by the assignments, would be giving effect to a foreign law against the express laws of our own State, and against the policy on which those laws are founded.

The rule laid down by this court in the case of *Saul v. His Creditors*, is so entirely conformable with justice and authority, that it cannot fail to claim the assent of all; "that, in a conflict of laws, it must often be a matter of doubt, which should prevail; and that whenever that doubt exists, the court which decides will prefer the law of its own country to that of the stranger. Or if positive laws of a State prohibit particular contracts from having effect according to the rules of the country where they are made, the former must prevail." Now, the positive laws of Louisiana prohibit the contracts of insolvents from having the effect of producing inequality of distribution. Our legislation would not be more explicit on this point, if it had declared in express terms, that no contract *made by residents or non-residents* shall produce that effect. Laws, where they declare a rule, declare it not only for one citizen but also for those who come within our State, or bring their property here.

What more then can be wanting? The law requiring delivery in contracts of sale was a general law, regulating the effects of that contract. It was made, says the court, to protect the citizen against fraud, and therefore it is applicable to all, or its purpose would not be effected. In like manner, the law forbidding preferences, is emphatically to protect the citizen from fraud. It is to insure a speedy and direct application of property to the payment of debts. It is, in fact, a *regulation of property*, and in every respect a *real statute* which no nation permits to give place to the statutes of other states. The leading positions maintained by jurists are, that laws which concern persons ought to be deemed of universal obligation; that laws which concern property ought to be deemed purely local; and that laws concerning both person and property, ought to be deemed local or universal, according to their predominant character. See Story's Conf. Laws, § 26.

There is much truth in the observations made by the court in the case of *Saul v. His Creditors*, that no attempt to reduce this subject to fixed rules has ever been successful, and from its nature, no attempt can succeed; that no nation will suffer the laws of another nation to interfere with her own, to the injury of her citizens; and that the extent to which they will adopt a foreign rule must depend on the condition of the country in which such rule is sought to be enforced, the peculiar nature of her legislation, her policy, and the character of her institutions.

"Personal statutes," says Merlin, "are those which have principally for their object the person, and treat only of property incidentally. Real statutes are those that have principally for their object property, and which do not speak of persons, except in relation to property. Such," he adds, "are those which concern the disposition which one may make of his property; either while he is living, or by testament." Story, § 13.

But when may a statute be said to have persons principally for the subject? Le Brun, as cited by Story, says: "It is necessary to examine whether it *universally governs the state of the person*, independently of property. *If it governs only particular acts of the person, then it is not personal.*" D'Aguesseau says: "If the statute has property directly for its *object or its destination to certain persons*, whose rights or acts are examined, *but the interests of others are the cause of the law*—if, on the contrary, it is directed to the person to provide, *in general, for his qualifications or his general absolute capacity*—in the first case it is real, in the second personal."

These rules have been adopted by this court in the case of *Saul v. His Creditors*. "The true principle in this matter," says the court, "is to examine whether the statute has property *directly for its object*, or its destination to certain persons, so that it is not their interest whose rights and acts are examined, but the interest of others to whom it is intended to assure the property. Or, on the contrary, the law is directed to the person to provide in general for his qualifications."

Now, the laws to be submitted to the test of these rules are those articles of the Code that declare that the debtor's property, he being insolvent, shall be devoted to a *pro rata* distribution; and to that end, they declare that his property shall be a common pledge. It cannot be denied that this law has property principally for its object. In the language of Merlin, "it concerns the disposition one may make of one's property." It only speaks of persons in relation to property. Again, in the language of D'Aguesseau and of this court, "it has property directly for its object, and the destination to certain persons, whose rights and acts are examined, *but the interests of others are the cause of the law.*" On the other hand, the law treats of per-

sons only incidentally, and certainly not to provide for the *general capacity of persons*. The clear object of the law is the destination of property, under particular circumstances, to creditors, and it is ordered *as a regulation of property*, on the same principles of morality that direct a portion of the estate, on the death of a father, to go to his child.

It has, therefore, I think, been established, that the subjecting the property to the rights of creditors here, does not call in question the legal effect of the assignments; that the legal effect is rightfully to be judged by our laws, because the contract was to take effect here; and that the law of Pennsylvania, giving preferences, cannot prevail in our State, over the positive legislation that condemns the practice as immoral and unjust.

But all this, says the counsel for the intervenors, may be so—the laws of Louisiana may be the proper laws to govern the case—they may declare, as they do, and as our courts have decided, that such conveyances are fraudulent; yet, *the bank being a corporation, is not subject to the rule that annuls a fraudulent conveyance!* And why? Because a bank is not capable of making a *cessio bonorum*, or of being forced to make a surrender of its property. The proposition is, that a foreign corporation coming here has a right to make fraudulent conveyances, because our laws do not enable them to make some conveyances that our citizens and other persons are enabled to make. Such a proposition need only be stated.

Again, the counsel for the intervenors asks, whether the United States is such a creditor as to avoid the fraud? Most assuredly she is such a creditor. But she is not, it is said, a citizen of Louisiana. Was Kimball a citizen of Louisiana? His residence in New York did not prevent his subjecting the property of the debtor, also a citizen of New York, to the payment of his debt, even against an assignment good by the laws of New York, where both resided. In 14 La. 11, the court asserted, that they were compelled to give the benefit of our laws to all who had a right to invoke them, and that the measure of justice was the same to our citizens and to those who, being citizens of other States, are, by the constitution, entitled to equal rights and privileges. The government of the United States is certainly not a citizen of any one State in the Union; but there is no right enjoyed by any citizen, and which from its nature it can enjoy, that it is not entitled to.

GARLAND, J. In this court the case has not only been fully and ably argued by the counsel for the United States, and the assignees, but we have been furnished with a very ingenious and well considered argument in writing, from a gentleman under-

stood to represent a number of other attaching creditors, not now before us, but whose interests are the same with the United States, except in the question of priority or preference claimed. Our attention has been directed not only to the law and decisions of the courts in England and in the various States of the Union, but to our own jurisprudence in relation to assignments or transfers of property in trust for the payment of debts, and conveyances made to defraud, delay, or hinder creditors in collecting debts. The decisions in different courts have been various and sometimes apparently contradictory, and the attempt to reconcile them, together with the extent of the ground covered by the discussion, and the points actually necessary to be decided, has made the investigation of the case tedious and protracted. To state all the decisions in detail, and to point out their coincidences, and their occasional apparent contradictions, the consequence generally, of a change in circumstances, would be a task more laborious and tedious than useful or necessary, in coming to a proper conclusion in this case; and the work of condensing and adapting the proper principles on which to place it, would be but little less so.

In every civilized nation, and particularly in those of a commercial character, the laws and the decisions of the judicial tribunals have uniformly been directed against every act of a debtor, fraudulent in itself, or calculated to injure or improperly delay a creditor in collecting his just demands. In England previous to the enactment of 13 Eliz. chap. 5, commonly called the statute of frauds, the courts, acting upon the principles of the common law, always went as far as they could in extending their jurisdiction, and the remedies they were authorized to apply, for the suppression of all frauds and conveyances, by which creditors would be injured, and the property of debtors protected. Since that statute has been made, the courts in England, with the same view, have always given it a liberal construction. In all the States of the Union, in which the common law forms the basis of their jurisprudence, and in those in which statutes nearly similar have been adopted, the same liberal construction has been given. Before, and ever since the well known case of *Twyne*, (3 Coke's Rep. 87,) this principle has been well understood. *Cadogan v. Kennett*, Cowper's Rep. 434. But it was not the object of the statute of

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13th Eliz. to invalidate a fair and *bona fide* transaction, (1 Binney's Rep. 514;) and it is not every conveyance that has the effect of delaying or hindering creditors, that is in itself fraudulent. In some degree, it is the effect of every assignment of a debtor's property for the benefit of creditors, to produce hinderance and delay; but the Supreme Court of the United States, in the case of *Sexton v. Wheaton*, (8 Wheat. Rep. 229,) said, that the assignment must be devised of "malice, fraud, covin, collusion, or guile" to bring it within the statute; and, in England, the same doctrine is established. 4 East, 13.

In this State, where our legislation and courts are particularly vigilant in guarding against all manner of devices by which creditors are to be defrauded or seriously injured, and the debtor benefited at their expense, or his property protected, the doctrine is well settled, that fraud is not to be presumed; that the law has established certain *indicia* or marks, by which it shall be known; and that every case must depend upon its own circumstances. 10 Mart. 436. 2 La. 309. 14 La. 184.

Roberts in his Treatise on Frauds, says, with respect to such conveyances or assignments as are taken by a creditor or creditors from a debtor, by way of security or satisfaction, that there can be no doubt, that they are *prima facie* good within the statute of 13th Eliz. (pp. 189, 436;) and Chancellor Kent says, a conveyance to pay debts is valid; and that that purpose forms a good consideration. 2 Johns. Ch. Rep. 182.

In England, the instances of assignments by debtors, for the benefit of creditors, of a part or the whole of their property, are comparatively rare, as in so commercial a country it might be supposed they would frequently be made; but as there is a bankrupt law in force, these assignments are not regarded with much favor when they establish a mode of payment different from it, or give preferences in violation of the general law. The courts consider such acts more as a fraud upon the law than upon individual creditors, and frequently disregard them; but when the assignments are general of all the property, for the benefit of all the creditors, and possession is taken by the trustees or assignees, the courts manifest a strong disposition to support them. In the case of *Pickstock v. Lyster*, (3 Maule & Selwyn, 371,) the object

of the conveyance was to prevent a creditor about to obtain a judgment, from satisfying it on execution. The debtor was insolvent, and pending the suit, executed an assignment to trustees of all his effects, for the benefit of all his creditors, and they took possession. Lord Ellenborough said, that the assignment was more an act of duty than of fraud, and that it arose out of the moral duties of the debtor, to make the fund available for all the creditors. Justice Bailey said, he assented fully to the doctrine, and that the conveyance, so far from being fraudulent was the most honest act the party could perform; and there was nothing new in this doctrine. 5 Term Rep. 235, 420. 8 Term Rep. 528. 4 East, 1. Opinion of Judge Story, in 4 Mason's Rep. 206. In this State, our citizens and tribunals, acting upon the broad principle laid down in that article of the Code which declares all the property of the debtor the common pledge of his creditors, have always been jealous of every conveyance or transaction calculated to defraud creditors, or give an unjust preference to one class over another; yet there are cases in which our Legislature seems to regard a particular kind of obligation, or engagements of a chirographic nature, as entitled to some favor, such as endorsements, for the security of which, both present and future, a mortgage may be given, although no actual obligation has been incurred; and also, payments made on the eve of insolvency in the ordinary course of business. Our laws in relation to the cession of property, afford to debtors such facilities in giving up their property for the benefit of creditors, that there is little or no inducement to make assignments; and it is not probable that we shall often be called on to act on any but those made in other States.

The general power to assign property to trustees for the benefit of creditors, has, in various States of the confederacy, been recognized and approved in the fullest manner, by both State and Federal tribunals. The Supreme Court of the United States in the case of *Brashear v. West*, 7 Peters' Rep. 608, declared that an assignment of all the property of a debtor, is not, *per se*, fraudulent, and that the right to make it results from the absolute ownership which every man claims over that to which he has a title, and of which he has possession. *Choses in action* can be

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assigned as well as property susceptible of, and actually reduced to possession; and courts of equity, in a commercial country, will, in consideration of the amount of property necessarily lying in contracts, protect the assignment, as much as courts of law will that of a *chose* in possession. 1 Maddock's Chancery, 546. There need not be any actual consideration given by the trustee, as the debts constitute a consideration; and the obligation of the trustee to perform the trust, is a sufficient consideration as to him. 4 Mason's C. C. Rep. 206. 10 Pick. Rep. 413. 7 Wheaton, 556. 11 Ibid. 78.

The principle is also well settled, that when the trust gives no authority to the trustee to give a preference, he cannot do it; but it is equally well settled, that a debtor, whether in failing circumstances or not, may dispose of his property for the use of his creditors, and may prefer one to another in the assignment. Hopkins' Ch. Rep. 373. 7 Modern Rep. 139. 5 Term Rep. 235, 420. 7 Taunton's Rep. 149. In the United States it is a very common practice; and the authorities are very numerous in Massachusetts, New York, Pennsylvania and other states. 5 Mass. Rep. 42, 144. 12 Ibid. 140. 15 Ibid. 233. 16 Ibid. 275. 11 Pick. Rep. 829. 5 Johns. Rep. 412, 335. 2 Johns. Ch. Rep. 283. 1 Binney's Rep. 414. 17 Serg. & Rawle, 250. Wallace's (Penn.) Rep. 21. 6 Cowen's Rep. 233. 7 Greenleaf, 241. 5 New Hamp. Rep. 113. And there are many other cases. For decisions of the Supreme Court of the United States, see 7 Wheaton's Rep. 565; 11 Ibid. 78; 4 Dallas, 76; 7 Peters' Rep. 608.

It is not denied in the argument that, in Pennsylvania, where the deeds under consideration were executed, both partial and general assignments may be executed for the benefit of creditors, and preferences given; and we see from a copy of a statute given in evidence, that there is a law in that State, the purpose of which is, not so much to regulate the manner of making these assignments or creating these trusts, as to provide for the proper execution or administration of them. The power seems to have been admitted by the Legislature, and the object of legislation was to prevent any abuses by the trustees, in carrying the powers conferred into effect.

By art. 10 of the Civil Code, and by art. 13 of the Code of

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Practice, we are expressly told, that contracts are to be governed by the law of the place where they are entered into; but that the form and effect of the actions instituted to enforce them, must be governed by the law of the place where they are instituted. Our jurisprudence has been in conformity to these principles, and is too well established to need the citation of authorities. It results from these articles, that if the deeds of assignment relied on by the intervenors are good and valid in Pennsylvania, and convey the property included in them in that State, then they will convey it here, unless there is something in our attachment laws to prevent it, or unless some preference has been acquired by the non-delivery of the property.

We will now proceed to examine into the validity of the deeds of the 7th of June, and 4th and 6th of September, 1841, according to the laws of Pennsylvania. That the assignment made on the 1st of May of that year to Dundas and others, of a large amount of the assets and property belonging to the bank, is good and valid, has been settled by the highest judicial tribunal of the State, in the case of *Dona v. Bank of the United States*, 5 Watts & Serg. 223. The opinion of the court in that case, is based on the powers granted by the charter to the corporation, and on the general laws of the State; from which it would follow, that the subsequent assignments are also legal and valid, unless the charter has in some manner been violated, or the other laws of the State infringed by the proceedings of the stockholders, or the action of the directors of the corporation. It has been decided by the highest judicial tribunal in the State of Connecticut, that a corporate body is as competent to make an assignment for the benefit of creditors, as a natural person, and to give a preference to one creditor over another, even after insolvency. It may, like individuals, discriminate, and stipulate in favor of a meritorious creditor. 6 Conn. Rep. 233. 8 Ibid. 505. The same principle has been recognized in two cases in Maryland. 6 Gill & Johns. 363, 206. It was there held, in the first of these cases, that the directors of the Bank of Maryland had full power to provide for the payment of the debts of the institution, by executing a deed conveying all the property of the bank in trust for that purpose. In the second case it was held, than an individual in

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failing circumstances might prefer one creditor to another, by a transfer of property made in good faith, and that a corporation might do the same. These cases are quoted with approbation by the Supreme Court of Pennsylvania, in the case of *Dana v. The Bank of the United States*. After stating the principles established in the cases in Connecticut and Maryland, the court, in the case of *Dana*, proceed to say, "All that is said here in respect to what a corporation may do, is peculiarly applicable to a corporation created for the purposes of trading and banking, where the business consists chiefly of buying and selling bills of exchange, and drafts or checks, and in discounting bills or notes, by means whereof, it either becomes a creditor or debtor, which makes it necessary for it to attend to the payment and receipt of all debts created in the course of such dealing as they shall fall due. Hence the very object and design for which such a corporation is established, renders it indispensably necessary that it should have as complete and absolute a right, at all times to dispose of and transfer its property and effects, for the purpose of paying, or securing the payment of its debts; or of giving, as has been done in this instance, a part of its property and effects to secure the payment of certain debts only, as any individual or mercantile company has or have. Hence the Bank of the United States, in this case, if it had not had any express power granted to it by the act of its incorporation, to dispose of and assign its property for the purpose of securing and making payment of its debts, either in part or in whole, as the occasion might seem to require, in the judgment of the board of directors, would have had such power, by necessary implication, from the very nature of its business, unless it were expressly restrained by its act of incorporation, which is not alleged or pretended.

"Seeing, then, that the Bank of the United States was invested with full power to do all that was done, or intended to be done in this case, and that it necessarily appertained to the management of the affairs of the bank, it follows as an inevitable consequence, as has been clearly shown, that it belonged to the president and directors, and to them alone, to do it, as also to determine on the propriety of its being done."

This language is plain and does not need comment, as to the

power to make the assignment, or trust, of the 1st of May, 1841 ; and, in another part of the opinion, the court say, that the assent of the stockholders was not necessary, as the directors could assign without it, or in opposition to their will. If this be true, and we do not feel authorized to decide otherwise, is not the doctrine as applicable to the last trusts as to the first ? It certainly is ; and we must look further for some violation of the laws of Pennsylvania, which will invalidate the deeds before us.

The counsel urge the want of assent of the stockholders to the trust, and that the directors had no right to dispose of all the property, so as to dissolve the corporation. As to the legal part of this argument, it is met by the reasoning in the case of *Dana* ; and as to the matter of fact, we think it is sufficiently shown, that the stockholders did assent. The resolutions passed at the meetings in April, 1841, and on the 4th of May following, in our opinion, fully expressed their assent to making assignments for the purpose of protecting and paying the post-notes, circulation and deposits of the bank ; but if there remained a doubt, it was removed by the resolution passed on the 18th May, 1841, authorizing the board of directors to act as they might think most discreet, and most beneficial for the institution.

But say the counsel for the appellees, the board of directors had no power to dissolve the corporation, by transferring all the property. Admitting that such would be the effect of an assignment of all the property, which it is not necessary to decide, what difference does it make, under the circumstances of the case ? The bank, it is said, was hopelessly insolvent ; numerous suits were pending against it ; on the judgments rendered, or about to be given, executions would have issued, and the whole property would probably have been sacrificed, and the corporation left without a dollar, and thereby dissolved. The result of either measure, according to the counsel for the plaintiffs, would be the same. Had the directors remained quiet, and permitted all the property and assets of the bank to be seized and sold, the charter would have ceased to exist, according to the argument ; and the assignment has no other effect.

The counsel for the plaintiffs further urge, that the assignments of June 7th, and of the 4th and 6th of September, are not made

in conformity to the laws of Pennsylvania, and that the intervenors have not complied with the provisions of those laws, by filing an inventory of the assets conveyed, and by giving security as required. As to the general power to make an assignment, it is needless to repeat what has been said in Dana's case; we shall, therefore, only look to the statutes of Pennsylvania, to see what else was necessary to be done in the premises, that has been omitted, and what may lawfully be dispensed with. The general law in relation to assignees for the benefit of creditors, passed in 1836, requires in every case of a voluntary assignment of real or personal property, whether general or partial, that an inventory of the property so assigned shall be filed by the assignee or assignees, within thirty days after the execution thereof, in the Court of Common Pleas of the county, together with the affidavit of such assignees, that the same is a full and fair inventory of such estate and effects; and the said court is authorized to appoint appraisers to make said inventory, &c., who shall be sworn to discharge their duties faithfully, &c. The assignees, as soon as said appraisement and inventory are made, are also bound to give bond and security for their faithful administration of said estate. These various requisites are fully set forth in the extracts we have made in the previous part of this opinion. It will be recollected, that with the assignment of the 7th of June, an inventory of the assets assigned was made and formed a part of it. With the other two assignments no inventory was ever made; nor, in either case, were bond and security given, as required by the law of 1836. The counsel for the intervenors contend, that the acts of the Legislature of the 4th and 5th of May, 1841, dispensed them from the necessity of making this inventory, and of giving the bond and security; and this brings us to an examination of those acts. They are fully set forth in the statement made of this case, and it will be seen are somewhat confused, and bear marks of that hasty legislation, which not unfrequently occurs near the close of a session. By reference to the proceedings of the board of directors of the bank, which are in evidence, it appears that it was not their purpose, in applying to the Legislature, to obtain the passage of such a law as was enacted. Their object was simply, in case of any assignment made, to dispense the

assignees from the obligation of making and filing an inventory and giving security as required by the law of 1836. But the Legislature seem disposed to go further, and provide for another contingency, which it was supposed might occur, in consequence of the provisions contained in the seventeenth section of the act of the 4th of May, 1841, being rejected; and, therefore, provided a mode by which the bank might go into liquidation, if the stockholders should decide it advisable, and, if not, then the original prayer of the board of directors was intended to be granted. The eighteenth section of the act only speaks of a general assignment, and of what is to be done in case it is ordered; and the first part of the nineteenth section, relates to the same subject; but when we come to the latter part of the section, it is evident, that the Legislature intended to do something else, and to provide for something else, otherwise it would have been unnecessary to have dispensed with the inventory and security "in case of any assignment or deed of trust, or other conveyance, which may be made by the President, Directors and Company of the Bank of the United States, for securing the payment of any portion of its liabilities." These words, with a repetition of them in the twentieth section of the act, clearly show, that a dispensation was meant as well in a particular assignment as in a general one. This construction of the law is sanctioned by the opinions of legal men of high standing, whose evidence has been taken, and opinions asked. The directors of the bank, after the passage of these laws, asked the advice of counsel as to their meaning, and were assured that they dispensed with the inventory and security. To us these provisions appear either to do that, or to mean nothing, which we cannot suppose. We are not at liberty to presume that the Legislature of Pennsylvania intended to do an idle and unnecessary thing, nor to limit the dispensation to a case of general assignment, when they say it shall apply to any that may be made "for securing the payment of any portion" of the liabilities of the bank. If our views of these statutes be correct, and we believe they are sound, then all the objections of the plaintiffs to the deeds, arising from a non-compliance with the provisions of the general law, are disposed of; and also some of those which go to establish a legal fraud, as the proposed assign-

ments were made known to the Legislature, and in some degree received their sanction.

As to any fraud, in the moral acceptation of the term, we see none in the making of these assignments. The bank was insolvent, or at least very much embarrassed; its creditors were pressing for the payment of their debts; some of them, the managers of the institution felt, were more entitled to consideration than others, and the law of their State authorized them to think so; and we do not see anything wrong, in the bank's first providing security for those who were willing to aid it in its abortive attempt to resume specie payments, and in securing those who held its notes as money or currency, or who, relying upon its good faith, deposited their funds in their vaults. Our own Legislature have shown that they consider debts of that nature entitled to some favor. See Acts of 1843, p. 56, *et seq.* Nor do we believe, these assignments void, under the statute of the 13 Elizabeth, ch. 5, which it is said is in force in Pennsylvania, as being calculated to hinder or defraud the creditors in collecting their debts. The laws of that State sanction acts of this kind, and have provided means to have such assignments enforced by the courts, and process to compel the assignees to execute the trusts confided to them. Preferences among creditors are allowed; and when the directors of the bank saw it was ruined, and its property and assets about to be sacrificed, we think, with Lord Ellenborough, that the assignment was more an act of duty than a fraud. The notes of the bank were scattered over the whole country, in the hands of the rich and the poor; they circulated as money, and the directors were bound to protect them from depreciation, if possible. It was the "most honest act the party could do."

In the course of the argument, it has been urged with great zeal, by all the counsel for the plaintiffs, that too much authority has been given to the assignees, and that they are irresponsible to the creditors for whose benefit the assignment is made. This does not appear to us a serious objection, as we are of opinion, that all the laws of Pennsylvania are in full force, to compel the assignees to do their duty, and to distribute the funds among those entitled to them. No part of the act of 1836, relative to assignees, is repealed or dispensed with, except as to the inventory

and security; and if any assignee abuses the trust confided to him, he is liable to be removed, and condemned to pay over all he has in his hands.

Another fertile source of complaint is, that clause of the June assignment which directs that the trustees, before making a dividend, shall give at least thirty days notice of their intention to do so in two newspapers in Philadelphia, and requiring the party to prove his debt before he is entitled to a dividend; and further, the fact that no time is fixed when the trust shall terminate. It seems to us, that the counsel have very much mistaken this clause of the deed. We see nothing unreasonable, in requiring thirty days notice of an intended dividend to be given, and a call to be made upon all entitled to receive it to come forward and present their demands for approval and payment. It is possible that the time may not be long enough, to enable all to present themselves at once; but any delay in doing so does the party no injury, as he is entitled to a full share out of a subsequent dividend, being first paid a full proportion of the first sum divided, nor do we see any hardship in requiring the creditors of the bank to prove their demands, if required. It is what all creditors are bound to do, whether their demands be against a bank or an individual. If the evidence is not satisfactory to the assignees, the courts of the State are open to the parties aggrieved. As to the time the trust is to close, the deed says, that when the final dividend is made it shall terminate; but if any one then remains unpaid, the bank, by the last clause of the deed, is still liable.

Another objection is, that the creditors have not accepted these trusts or assignments made for their benefit. It is apparent that they have not done so, on the face of the deeds; but it may be done in other modes: *first*, by claiming the benefit of them; and *secondly*, it is presumed, when it is shown that the assignment is for the benefit of the creditors, and that there is a competent grantor and trustee. The title to the property passes by such a conveyance, and vests in the trustee subject to the purposes for which it was conveyed. 4 Mason's Rep. 206. 11 Wend. 248. 4 Johns. Ch. Rep. 529. 4 Mason's Rep. 183. 2 Gallison's Rep. 557. 2 Conn. Rep. 579, 633. There are no conditions in the

assignment that the creditors shall release their debts, nor any thing calculated to delay them unreasonably.

It is urged, that there was no delivery of the property and assets assigned, and that, therefore, it was subject to attachment. As to the property in this State, the evidence of delivery is most satisfactory. It consists principally of debts owing by various persons, and the evidences of those debts were in the hands of Frazier, an agent, in the spring or summer of 1841. He carried all those papers to Philadelphia; they were delivered to the assignees by the bank, and again by them delivered to the witness, Frazier, as their agent, who returned with them to this State, in the autumn of that year, and took possession of such other evidences of debt as remained; and, when the attachment was levied, all the property was in the hands of the agents of the intervenors. We do not know of a more conclusive mode of giving possession of a debt, than by delivering the evidence of it. In some cases notice to the debtor is required to be given, but not always. In cases of transfer of bills of exchange and notes payable to order, no notice is necessary previous to maturity; nor is it afterwards, except for the purpose of preventing the parties bound from acquiring equities against the holder, to which they might be entitled if not notified. In stating the evidence in relation to delivery and notice of transfer, the manner is set forth, and we repeat, it is satisfactory to us. It is not pretended that the Bank of the United States remained in possession of any of the property conveyed, after the assignment, nor has it exercised any control over the assignees, or their agents, so far as we are informed. There are none of the badges of fraud attending this transaction, which, according to the best authorities, indicate it. In Pennsylvania it appears clear that the delivery was sufficient, In *Dana's case* and 1 *Binney's Rep.* 502.

It is next maintained, that assignments, or transfers, made in Pennsylvania, so as to affect creditors, of property in this State, can only be made according to the laws of this State, and subject to the restrictions prescribed by those laws. In considering this proposition, it is first to be understood, that this is a Pennsylvania contract, made in that State; and, as between the bank and the assignees, and the latter and the creditors for whose benefit it was intended, to

be executed there. None of the funds are to be distributed here ; our laws have nothing to do with them ; nor is any citizen of our State, so far as we know, a party to the contract, or in any way to be injured or benefited as a creditor. Our people are the debtors ; and, as to them, it is immaterial who gets the money, when their debts are discharged. The parties complaining have all, we believe, abandoned the courts of Pennsylvania, where they commenced the prosecution of their demands, and where their debtor resided, and have come to claim of our citizens the debts they owe, and as soon as they can be collected the amount will be withdrawn from among us.

As a general rule, we believe it may now be considered as settled in the United States, that an assignment under a bankrupt law of a foreign country, does not operate as a transfer of a bankrupt's property in them. Story's Conf. of Laws, §§ 410, 411. 2 Kent's Com. 404-408, 3d edit. ; and the authorities cited by those writers. But there is a distinction between an assignment under a bankrupt law, and a voluntary assignment made by the owner residing in a foreign country. In one case, the transfer is by the operation of the law of a foreign country ; in the other, it is the act of the party. 6 Pick. Rep. 286. Story's Conf. of Laws, §§ 410, 411. 2 Mart. N. S. 93, 97. 6 Binney's Rep. 353.

The law is otherwise in England, and, we believe, on some portions of the continent of Europe ; but the doctrine is well established in this country. In a few of the States it has been held, that a transfer by assignment does not protect the property from attachment, subsequently to the bankruptcy or insolvency ; but that, we think, a harsh interpretation of the law, and we shall certainly not extend it to any one not a citizen of our own State.

We consider the doctrine as well settled now, that personal property has no locality, and that the laws of the owner's domicile should, in all cases, determine the validity of the transfer or alienation, unless there is some positive or customary law of this country to the contrary. Story's Conf. of Laws, § 383, *et seq.*

This being the case, and considering the transfer and assignment made in Pennsylvania legal, and sufficient to transfer the

property situated here, we are of opinion, that it should be decreed to belong to the intervenors.

The counsel for the appellees have called our attention to a variety of decisions made by this court, in opposition to assignments made in other States. The first is that of *Fellowes v. The Commercial and Railroad Bank of Vicksburg*, 6 Robinson, 246, in which we held the assignment as null, against an attaching non-resident creditor. The reasons for that decision are fully stated in it. The assignment, under which the intervenors claimed, was not shown to have been valid under the laws of Mississippi; and besides, the principal object of the pretended assignment was, not for the benefit of creditors, but first to complete the rail-road, which was not assigned at all, although it appeared to be the most valuable property owned by the corporation.

The next case is that of *Beirne & Burnside v. Patten and others*, 17 La. 589. The plaintiffs were citizens of this State, and the debts contracted in it. Under those circumstances, and it not being shown that the assignment to *Vaulx & Butler* was good in Tennessee, where it was made, and it being doubtful whether the property was in the State at the time of the assignment, this court followed a decision made in the case of *Ingraham v. Geyer*, in Massachusetts, (13 Mass. Rep. 146,) in which it was held, that, as it was not certain whether the property had been delivered to the assignee, the attachment was good. The case of *Olivier v. Townes*, in this court, (2 Mart. N. S. 93,) turned upon the same point; the delivery of the ship attached not being considered perfect. That has always been considered, in our tribunals, the pivot on which these cases turn.

The last question is, as to the preference or priority claimed by the United States, under the acts of Congress, which, in cases of insolvency, and where a general assignment of all the property has been made, give a right of priority to debts due them. 2 Laws U. S. 595, § 5. 3 Ib. 197. The Supreme Court of the United States, in various cases, have passed on these provisions, and have said, that there must be an actual insolvency, though not a declared one, and that the assignment must be general; but that a party by assigning all his property by different acts,

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cannot thus, under the pretext of the assignments being partial, defeat this right of priority. 3 Cranch, 61.

In this case, the judge of the Commercial Court, thought that the bank was insolvent at the time the assignments in question were made, and that all of them should be considered as one, and that the priority existed. In this, we think the judge did not err. The evidence shows, that the bank was insolvent at the time the deeds in question were passed; and we also think, that it establishes an intention to make further assignments, if those already made should not be sufficient to satisfy the creditors intended to be secured.

Besides, this view of the case is sustained by the conditions upon which the defendants accepted the transfer of the property and assets from the old Bank of the United States. It was a trust on the part of the new bank, and we cannot permit them to defeat it, by making an assignment of their property.

Judgment affirmed.

HYDE and another v. THE PLANTERS BANK OF MISSISSIPPI.

The seventh section of the statute of the State of Mississippi, of the 21st February, 1840, which declares that, "it shall not be lawful for any bank in that State to transfer by endorsement, or otherwise, any notes, bills receivable, or other evidence of debt" did not impair any obligation contained in the charter of the Planters Bank of Mississippi, and is not a violation of any prohibition in the constitution of the United States. *Per Curiam*: The statute does not impair the obligation of any contract existing between the bank and its debtors. It modifies the capacity of the bank to cede to another the right to enforce such contracts. Nor can the bank be said to have any vested right to make such a transfer, resulting from any contract with the State. The capacity of contracting is generally within the power of the Legislature, in reference to future contracts; and remedies may be modified at its will.

A very strong case must be made out, to induce the court to declare a law of a neighboring State unconstitutional, especially when it appears that the purpose of the law was in a great measure remedial.

The court will not, in any case of serious doubt as to the constitutionality of a law, pronounce it void.

No one can be said to have any vested right in any existing legal capacity in refer-

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ence to any future contract, or advantage to result from that capacity. The capacity or incapacity of particular classes of persons to contract, or to inherit, depends upon the legislative will.

APPEAL from the District Court of the First District, *Buchanan, J.* The facts of this case are thus stated by

BULLARD, J. The judgment rendered in favor of Hyde & Goodrich against the Planters Bank of Mississippi having been reversed in this court, after a part of the amount claimed had been paid over to them pending the devolutive appeal, and consequently the bank being entitled to restitution, Abm. N. Ogden, their assignee of a balance of about \$470, took a rule upon Hyde & Goodrich, to show cause, why an execution should not issue for that amount, for his benefit.

To this rule, after an exception which was overruled, and need be no further noticed, as it appears that all objections to the form of proceeding have been waived, the appellants answered, denying the transfer to Ogden, or that there was any consideration therefor. They plead in compensation bank notes of the Planters Bank amounting to \$310, and protested checks to the amount of \$171, besides damages and interest, and they allege, that by the laws of the State of Mississippi, the bank could not transfer the claim against them so as to defeat their right to the off-set.

On the trial of the rule, the defendants Hyde & Goodrich produced the checks and notes, which indeed had been filed in court with their answer; but, with respect to the bank notes it was not shown, that the defendants in the rule were the holders of them at the time the notice was given of the transfer. The court allowed the off-set for \$171, the amount of the protested checks, and pronounced the statute of Mississippi, upon which the defendants in the rule rely, in support of the plea of the incapacity of the bank to make the transfer, unconstitutional; and Hyde & Goodrich have appealed.

Peyton and I. W. Smith, for the appellants. The plea of compensation would be good though plaintiffs had acquired the notes after notice of the transfer. Such is the law of Mississippi. See *Howard & Hutchinson's Digest*, 373, sec. 12; *Ibid.* 615, sec. 5. *Laws of 1840*, p. 15, sec. 7. *Ibid.* p. 21, sec. 2. But it is said, that the laws of 1840 are a violation of the charter, and unconstitutional. It does not appear whether the bank accepted

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those laws. From their words it is obvious, that the Legislature did not consider an acceptance necessary. A brief review of the history of the charter and of the subsequent legislation will show, that the Legislature have not so far exceeded their powers as to authorize this court to declare their laws a dead letter.

From the charter and amendments it appears that, in 1830, the State created the bank, with a capital of \$3,000,000, two-thirds of which the State reserved to itself. There are thirteen directors, of whom seven were selected by the State. To furnish the bank with means and credit to go into operation, and carry on its business, the State issued its bonds. It directed that all sums of money in the State Treasury on account of the three per cent fund, should become part of the capital of the bank; and that all unexpended moneys in the State treasury, and all moneys collected for State taxes, and all other moneys collected by the State officers, should be deposited in said bank. It declared, that all the notes of said bank payable on demand, should be receivable in payment of all debts due to the State. It was thus a bank of the State in the strictest sense of the term, and was also the treasury of the State.

Ten years afterwards, we learn from the laws and resolutions, that the State had fallen into an "embarrassed condition," caused by "excessive banking;" that honest enterprise had been converted into "a spirit of wild speculation;" and that "extravagance," "a looseness of morals," and "every species of gambling and over action in every branch of business," had been engendered, and were "the melancholy signs of the present times." See Laws of Mississippi, for 1840, p. 263.

In one brief week after this solemn legislative declaration of the corruption and fraud of the banks, they passed the first law of the session, having for its object to "require the several banks in this State to pay specie," &c. The resolutions declared the evil, and the law applied the remedy. The great object was to provide a remedy for the violation, on the part of the banks, of their promises to pay specie. This first effort was followed up, in 1844, by another act placing the Planters Bank in liquidation, and making a violation of the law by any of the officers, a felony. The sole object of these laws is to give effect to the charter, not to violate its provisions. Can it be said that the Legislature of Mississippi have acted in bad faith, and have not disclosed their real motives? Or that the Legislature have adopted means so little calculated to effect their purpose, as to authorize this court to pronounce them unconstitutional?

The only question is, whether the Legislature could, as a rule of proceeding, say to *this* insolvent bank: "You cannot prefer

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one creditor to another, in the payment of your debts. All your creditors must share equally in the payments from your property. If you attempt, (as in this case,) to pay one creditor by assigning to him a debt due to the bank, your assignee shall have no greater rights than you had, and all your obligations may be pleaded as a set-off against any claim by you or your assignee." If the Legislature could constitutionally go thus far, then the plea of compensation in this case cannot be overruled on the ground of unconstitutionality:—See *Union Bank of Tennessee v. Ellicott*, 6 Gill & Johnson, 371. *Bank of Maryland v. Ruff*, 7 Ib. 465. In the last case cited, the court say, that the question of the constitutionality of the law of Maryland as to the right of off-set, is settled by the affirmative decision of the Supreme Court of the United States.

T. Slidell, for Ogden, *contra*. In a case like this, compensation ought not to be admitted. Art. 2207 of the Civil Code declares that compensation takes place, whatever be the causes of either of the debts, except in case—1st of a demand of restitution of a thing of which the owner has been unjustly deprived, &c. The Supreme Court having reversed the judgment, under which Hyde & Goodrich obtained this money, they should have immediately paid it back, in specie or its equivalent.

When the assignment was notified to Hyde & Goodrich, they produced as an off-set, the protested drafts of the bank to the amount of \$170. No previous tender of them had been made to the bank; and it is now contended, that compensation, for that amount, had taken effect by the mere operation of law. Such is not the meaning of our code. When compensation takes place by mere operation of law, the two debts are *reciprocally* extinguished; and unless the effect is *reciprocal*, compensation does not take place. In the case of *Fagot v. Porche*, 7 La. 564, this court said, that "the absence of all connexion between two demands, is an insurmountable objection to a demand in compensation or reconvention." If the claim of the bank for this money, of which they had been unjustly deprived, was extinguished, *pro tanto*, the moment Hyde & Goodrich came into possession of those drafts, then those drafts, if they had been negotiated by Hyde & Goodrich, would have been dead in the hands of any subsequent holders; and yet it would seem an extraordinary defence for the bank to set up against such paper, when sued on it, that it had once been held by persons indebted to them, and by that circumstance had been deprived of vitality. It was too late after the assignment by the bank, to offer these drafts in compensation. No compensation could then be pleaded, except such as had been operated by law;—and the mere possession of negotiable paper

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of the creditor, without any tender having been made, cannot be said to have produced the reciprocal extinguishment of the debts.

As to the bank notes pleaded in compensation, the evidence shows that Hyde & Goodrich did not have them when notified of the assignment.

As to the statute of Mississippi prohibiting the transfer by the bank of its assets—it appears by the charter, that the bank was by law clothed with all the rights and privileges of other banking companies; and it is well settled, that the Legislature cannot pass a law destroying or impairing the rights granted by their charters.

This statute was never accepted by the bank; is a violation of its charter; and cannot prevent it from making a valid assignment of its debts. Story on the Constitution, 261. To take from a bank the power of disposing of its assets, is practically to arrest all its functions as a bank, and to abolish its banking privileges. Stripped of this power it would cease to be a bank.

If this bank has been improperly managed, and has violated its charter, the remedy is by judicial action, at the suit of the State, to obtain the forfeiture of its charter. But the Legislature had no authority to assume such violation of its charter or abuse of franchises, and punish the corporation by stripping it of an authority vitally essential to its business, and the purposes of its charter. See the case of the *Trustees of Dartmouth College v. Woodward*, 4 Wheaton's Reports, 518.

BULLARD, J. The enactment of the Legislature of the State of Mississippi, which the District Court considers as unconstitutional, because it impairs the obligation of a contract, to wit, the charter of the Planters Bank, is contained in "an act, approved on the 21st of February, 1840, entitled an act requiring the several banks in this State to pay specie, and for other purposes." It is the seventh section, and provides: "That it shall not be lawful for any Bank in this State to transfer, by endorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was so transferred, the same shall abate upon the plea of the defendant." Acts of 1840, page 15.

It ought to be premised, that the Planters Bank was a State bank, the State owning one-third of the stock; and the charter pledges the faith of the State to make good all losses which may accrue from a deficiency of the funds of said bank, or by

other means, in proportion to the amount of stock which it holds. That, in common with other persons, natural and artificial, the bank had the authority to transfer *choses in action* as incident to their capacity to contract, is clear; but it failed to redeem its notes in specie; its notes became depreciated, and it incurred the risk, to say the least of it, of forfeiting its charter. It was under these circumstances that the Legislature passed the act containing the above recited provision.

But it is contended, that by the charter of the bank it was authorized to hold and possess real and personal property of every kind, and to sell, alienate, or dispose of the same for the good of the bank, and to do and perform all and singular such matters or things as to them may appear necessary, or which to them may appertain to do as incident to bodies corporate; and that the Legislature could not deprive the institution of any of these powers, without a violation of the charter, and thus impairing the obligation of contracts.

It appears to us very clear, that the statute in question has not impaired the obligation of the contract, as between Hyde & Goodrich and the bank. The former are still bound to pay, the latter have still a right to recover. But the law has modified the capacity of the bank to cede to another its right to enforce the contract; nor can the bank be said to have any vested right to make such a transfer, resulting from any contract with the State. The capacity for contracting is generally within the power of the Legislature in reference to future contracts, and remedies may be modified at the will of the Legislature. "Any deviation," says Judge Story, "from the terms of a contract by postponing or accelerating the period of its performance which it prescribes; imposing conditions not expressed in the contract; or dispensing with the performance of those which are a part of the contract, however minute or apparently immaterial their effect upon it, impair its obligation"—He proceeds to say, that the abolition of all remedies operating *in præsentia*, is also an impairing of the obligation of a contract; "but," he adds, that "every change and modification of the remedy does not involve such a consequence no one will doubt." 3 Story on the Constitution, § 1379.

But it is said, that the contract violated is the privilege granted

to the bank to dispose of its assets as it may think proper, and that such a modification of the charter, without the consent of the corporation is unconstitutional; and that it is not shown that the bank has accepted this modification of its charter.

No adjudged case has been referred to in support of this position, and a very strong case must be made out to induce us to declare the law of a neighboring State unconstitutional, especially when it appears that the purpose of the law was, in a great measure, remedial. We see in that statute one of the means adopted by the legislative power of the State, to maintain inviolate its plighted faith, that the public shall suffer no loss by the operations of the bank, by preventing them from disposing of their assets or portfolio, and suffering their circulation to perish on the hands of the people, and from providing for some favored depositors by a transfer of bills receivable while its notes in circulation are at a heavy discount; by, in effect, compelling the banks always to receive in discharge of obligations due to them the currency with which they have flooded the country, and refusing to the transferee any action upon such evidence of debt. It leaves the remedy by direct action still open to the bank, and only refuses an action to their assignees. A law which should deny to the bill-holder a right to pay a debt due to the bank even in the hands of a transferee, in its own circulation, always payable to bearer, and passing from hand to hand as cash, and so difficult to be traced and identified in the ordinary course of business, would, in our opinion, be as justly liable to be treated as violating the obligation of a contract. But this court will not in any case of serious doubt as to the constitutionality of laws, pronounce them void, especially when their operation is to protect our own citizens from injuries arising from the abuse of the banking power. The disability created by the statute affects not merely the Planters Bank, but all of a particular class of artificial persons, not in reference to any peculiar corporate right or franchise, but as to a species of contract, of which they were previously capable, in common with all other persons capable of contracting at all. No one can be said to have any vested right in any existing legal capacity in reference to any future contract, or advantage to result from this capacity. He who to-day is by law a forced heir in expectancy, may to-morrow by a new law, be

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declared liable to be disinherited by will, or incapable even of succeeding *ab intestato*. It may be assumed, indeed, as a general rule, that the mere capacity or incapacity of particular classes of persons to contract, or to inherit, depends upon the legislative will.

We, therefore, conclude, that the law of the Legislature of Mississippi must have its effect, and that the appellee acquired no legal title to the debt due by the appellants to the Planters Bank.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, that the rule taken by the appellee be discharged, and that he pay the costs of both courts.

JOHN FLEMING v. LUCIEN GUILLAUME HILIGSBURG and another.

APPEAL from the District Court of the First District, *Buchanan, J.*

A. Hennen, for the plaintiff.

P. A. Bernard and *Roselius*, for the appellants.

SIMON, J. The plaintiff's claim is founded on a building contract, on which, he says, there remains a balance due him, which added to the amount of an account for extra work done to the buildings, forms the sum for which he asks judgment.

The defence sets up, that the plaintiff did not comply with the obligations by him contracted; that the work is defective and done in an unworkmanlike manner in many particulars specified in an account annexed to the answer, for which he is responsible to the respondents in the amount therein stated; that besides said amount, plaintiff is indebted to them in several other sums, on account of the work left unfinished, and for materials; as also for the delay in delivering the houses contracted for, for which, according to the contract, he was to pay the respondents rent, at the rate of \$400 for each month's delay. The respondents aver, that only one of the houses was delivered three months after the time specified; and, that the three others have never been finished, and were abandoned by the plaintiff, which put the respondents

under the necessity of causing the work to be done by other workmen. They further allege, that the plaintiff has performed some extra work, but not the quantity, nor to the amount by him claimed, and that he is also entitled to a credit for a partition wall to an amount less than that claimed in the petition. From all which credits to which the respondents are entitled on the amount really due to the plaintiff, there results a balance in their favor, for which they claim judgment by way of reconvention.

The jury who tried this cause, found a verdict for the plaintiff for \$4773 04; and judgment having been rendered thereon against the defendants, after a vain attempt to obtain a new trial, the latter have appealed.

The evidence shows, that a building contract was passed between the parties, by which the plaintiff undertook to build four houses for the defendants, according to the proportions, specifications and conditions therein stipulated, for which he was to receive, at different times, certain remuneration, amounting altogether to \$30,000; \$3500 of which, being the last instalment, was to be paid when the whole should be entirely finished, and the keys delivered. Of this amount or consideration of the contract, the plaintiff admits that he has received the sum of \$28,286.

It appears, however, by the testimony of John Reynolds, that a statement of extra work done by the plaintiff to the houses, annexed to said plaintiff's petition, shows the valuation put by the witness, on the said extra work, to be a sum of \$5310, as claimed in the said petition; and that the witness took, for that purpose, the buildings as they now are, measured them anew and compared them with the plan, and that he considered such valuation as fair. But he also states, that as to this being extra work or not, he knows nothing, except so far as he has learned from the plaintiff.

But it is shown by the testimony of Joseph Pilié, by whom, according to the terms of the contract, the work was to be received, that he examined the work, and made a statement of the extra work, *the contract in hand*, and could find no other extra work but that stated in his said statement, in which it is estimated at \$2769 13. This estimation thus made by the witness, is consequently the result of a comparison between the specifications con-

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tained in the contract, and the work actually done; and establishes, with much more certainty than that made by Reynolds, who knew nothing of the extra work except from what the plaintiff had told him, to what extent the work which was examined, should be considered as extra work, or as work done under the contract. 'This statement of Joseph Pilié, ought, in our opinion, to be taken as correct.

The same witness states further, that the work which he includes in another statement by him signed, as having been omitted, and which he estimated at \$738, is not included in the statement made by Williamson; and that this examination was made when plaintiff was present. We think this credit should be allowed.

John Williamson, whose statement was also produced, testified that said statement is the result of his examination; that to complete the buildings according to the contract, it would be necessary to do the work mentioned in his statement; and it appears from said statement, as signed by the witness, that the work therein described as having been omitted, amounts to \$1037 20. This also should be allowed.

It appears further, by a statement signed by Joseph Pilié, showing the amount to be allowed to the plaintiff for the partition wall, for which he claims \$722 70, in his petition, that the latter sum should be reduced to \$490 61, being the one-half of the amount of the partition wall, to be, under the contract, reimbursed to the undertaker as extra work.

It is shown also by two accounts accepted and signed by the plaintiff, that the defendant should be credited with two sums, to wit; one of \$485 25, and another of \$311, being the one-half of two partition walls separating the lots of P. Avegno and Marsoudet from the defendants', and, which sums were to be reimbursed by the defendants to the neighboring proprietors. This is clearly a proper charge to be deducted from the amount due on the contract, as the work was already done, although included in said contract.

The testimony of F. Marchat proves, that plaintiff had an account current for lumber with one of the defendants, leaving a balance against the former of \$583 91, the account whereof was

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handed to said plaintiff, who made no objection thereto, whilst he, plaintiff, objected to and denied another account, on which he was subsequently sued. This is also supported by a certain number of receipts for timber produced in evidence, and, in our opinion, should also be allowed.

The parol evidence produced to establish the delay complained of by the defendants, proves, that said delay cannot be attributed to the plaintiff's neglect or fault, but mostly to the want of materials, which, under the contract, were to have been procured by the defendants, or to their bad quality when furnished, or to the inclemency of the weather. One of the witnesses states, that the work which he did in five months, could have been done in two, if he had had the materials and every thing necessary and ready. Another says, that the bricks were not always regularly furnished, which was owing to the bad weather, when the carts could not come up. Another testifies, that the work was often impeded by the delay of the materials, which were not received when they should have been; and that the lumber which was received was unfit for the work. He adds, that there was a delay in furnishing bricks and also in furnishing lumber, and that the work in general was done in as workmanlike a manner as it could have been, with the materials used. It is, therefore, clear that the claim set up the defendants in reconvention, in consequence of the delay in delivering the work according to the contract, ought to be rejected.

Under this state of facts, we are at a loss to find out how the jury could come to the conclusion that the plaintiff is entitled to recover the sum of \$4773 04. Their verdict is clearly erroneous. The evidence does not justify it; and, taking the facts as they are disclosed by the record, it seems to us, that the respective claims of the parties cannot be liquidated in any other manner than as follows:—

Plaintiff is entitled under the contract to . . .	\$30,000 00
The amount of extra work, as estimated by J. Plié, is . . .	2,769 13
Due plaintiff for his half of the partition wall, alluded to in his petition	490 61
Plaintiff is entitled to claim	<hr/> \$33,259 74

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He has received at different times, as by	
him admitted	\$28,286 00
Work omitted, as shown by Williamson's	
statement	1037 20
Work omitted, as shown by Pilié's state-	
ment	738 00
Due defendants for half of Avegno's par-	
tition wall	485 23
Due defendants for half of Marsoudet's	
partition wall	311 00
Balance of account due by plaintiff to Ber-	
nard	583 91—31,441 34

Balance in favor of plaintiff \$1818 40

We think that the plaintiff is only entitled to a judgment for the sum of eighteen hundred and eighteen dollars and forty cents, instead of that allowed by the judgment appealed from; that the above liquidation is in strict conformity with the evidence; and that there is no necessity to send the case back for a new trial.

It is, therefore, ordered, that the judgment of the District Court be annulled, and that the plaintiff recover of the defendants, the sum of eighteen hundred and eighteen dollars and forty cents, with legal interest per annum thereon from judicial demand until paid, and the costs of the lower court; those in this court to be borne by the plaintiff and appellee.

SAME CASE—ON A RE-HEARING.

BULLARD, J. We have looked again into the evidence in this case, upon the re-hearing, and are still of opinion that the plaintiff has failed to prove that he did extra work to the amount claimed by him. Reynolds, whose statement is in the record, says his information was derived from the plaintiff himself. The testimony of Williamson, and especially of Pilié, who, by agree-

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ment, was to act as expert, in case of difference between the parties, appears to us to sustain the judgment first rendered.

It is, therefore, ordered that it remain undisturbed.

HENRY T. IRISH v. JOHN T. WRIGHT, and others.

Where the master of a steamer, for the fraudulent purpose of aiding a debtor in removing his property into a foreign country beyond the reach of a creditor, conceals from the latter the fact of his having entered into an arrangement with the debtor for its removal, and, with a full knowledge of the rights of the creditor, transports the property out of the United States, thereby preventing the creditor from levying an attachment and saving his debt, he will be liable to the creditor for the amount of the debt, where it does not exceed the value of the property so removed.

An attachment may be obtained though the debt be not due, provided the plaintiff make oath to the existence of the debt, and comply with the other requisites of the sixth section of the Stat. of 7 April, 1826. C. P. 240, 242, 243.

After property attached has been bonded, and the case is at issue on the merits, it is too late to object to the attachment as irregular, in consequence of the suit being for damages.

Civil process may be served on the the twenty-fifth of December. That day is not mentioned in art. 207 of the Code of Practice, among those on which no such process can be served.

Statements made by a juror of the reasons for his concurrence with the other jurors which are inconsistent with his oath as a juror, furnish no ground for a new trial.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Peyton, I. W. Smith and Grymes*, for the plaintiff.

T. Slidell, for the appellant.

I. The defendant being entitled to avail himself of all irregularities in the attachment suit against Alsbury, contends, that the attachment in that case was void by reason of the insufficiency of the affidavit. The plaintiff's agent swore only that defendant was justly and really indebted to plaintiff, and did not swear that the debt was *due*. There are two cases in which an attachment may issue, to wit; when the debt is due, and by the statute of April 7th, 1826, when it is not due. Where the debt is not due, a special statement of circumstances or grounds is required. Either the fact that the debt is due, or the special circumstances justifying the remedy before maturity, should appear on the face of the

affidavit. By article 242 of the Code of Practice, it is declared, that "the property of the debtor may be attached in the hands of third persons, by his creditor, in order to secure the payment of a debt, whatever may be its nature, whether the amount be liquidated or not, *provided the term of payment have arrived*, and the creditor, his agent or attorney in fact, who prays for the attachment, state expressly and positively the amount which he claims." And by article 243, it is provided, that "a creditor wishing to have the property of his debtor attached, must demand, in a petition presented to a competent judge, with a declaration made under oath, at the foot of said petition, stating the amount of the sum *due* to him, and that his debtor is either on the eve of leaving the State, that he has left it never again to return, that he resides out of the State, or that he conceals himself in order to avoid being cited." The word *due* is found both in the English and French texts.

The remedy by attachment is a severe one and it must be strictly construed; all the requisitions of the law must be complied with, or the proceedings are, *ab initio*, void. See the case of *Millaudon v. Foucher*, 8 La. 588.

II. The attachment against Wright was issued in a suit for damages for an alleged tort. Such a cause of action cannot support an attachment.

Under the legislation which preceded the Code of Practice, the remedy by attachment was expressly given for damages, *eo nomine*. The 2d section of the act of 1817, p. 26, contains the following provision; "That in all actions when the amount of the sum due is one hundred dollars or upwards, whether upon bond, bill of exchange, promissory note or liquidated account, and in every case where the amount of the debt, *damages* or demand is ascertained and specific, if the plaintiff in action, &c." But the Code of Practice, which abrogated all pre-existing laws on the subject of practice, (March 25th, 1828,) omits the word *damages* and substitutes the word *debt*. It adds also an expression and qualification, inconsistent with the idea of damages for a tort. Thus, in art. 242, we find it is only allowed, *provided the term of payment have arrived, pourvu qu'elles soient échues*. It is unreasonable to suppose that the Legislature meant by these expressions, to comprehend the case of damages for a tort or offence; and we may readily perceive the propriety of restricting this severe remedy to matters springing out of contracts, or obligations. See 6 Mart. N. S. 564. 2 Ibid. N. S. 323. In actions for damages for a wrong, the amount is necessarily uncertain.

III. The evidence shows, that the plaintiff's agent was not deceived by any statement or act of Wright—he so states himself. Consequently, though it should be considered that Wright at-

tempted to deceive him, yet if he was not actually deceived, there can be no claim for damages. The rule of law is well explained in 2 Starkie, p. 466. "To support an action on the case for deceit, the plaintiff must allege and prove a fraud to have been committed by the defendant, and that a damage has resulted from the fraud to the plaintiff. The fraud must consist in depriving the plaintiff, by deceitful means, of some benefit which the law entitled him to demand or expect." So at p. 471, "The gist of the action is, that the plaintiff was imposed upon by the fraud of the defendant. If therefore it appear, that the plaintiff *was aware of the falsity of the representation*, or made the contract, to use a common phrase, with his eyes open to the defect, he is remediless, *for he was not deceived.*"

IV. The damages must be conformable to the *facts of the case, and the injury actually sustained by the party*. The rule for damages in cases such as the present, where service of process is alleged to have been frustrated, may be reasonably deduced by analogy, from the decisions in cases of failure by sheriffs in the execution of process. Thus, a sheriff who fails to obey the legal instructions of the plaintiff in execution, is not bound for the whole amount of the judgment, but only for such damages as the plaintiff has actually suffered thereby. *Morgan's Admr. v. Voorhies*, 3 Mart. 479.

A sheriff's responsibility for permitting an escape on *mesne* process, is limited to the loss actually sustained by the plaintiff. *Clark v. Wright*, 5 Mart. N. S. 125.

Sheriffs are directly responsible, so far as their negligence or want of skill in the execution of their official duties causes a direct injury; but not for losses remotely consequential, and such as grow out of a failure to gain. *Lambeth v. Mayer*, 6 La. 737. In an action for damages against officers for neglect, the redress in damages should always be proportioned to the injury really sustained. It would be unjust in such cases to place the plaintiff, at the expense of the defendant, in a better condition than he would have been in, if no such neglect had occurred. 1 Rob. 292. In an action against a sheriff for an escape and *false* return on *mesne* process, the plaintiff can recover no more than he might have done in the original action; nor ought he to recover more than he has actually lost in consequence of the escape. *Potter v. Lansing*, 1 Johns. Rep. 215.

V. To justify a verdict for the total amount of plaintiff's debt, \$13,333 33, the plaintiff should *have proved that the property of Alsbury was placed irrevocably beyond his pursuit; this is not only not proven, but the reverse is proved.*

McCaughan, (plaintiff's agent,) proceeded in the steamer to

Texas, and on arriving there, instituted a suit for Irish against Alsbury, and had the *slaves sequestered*. See the record.

This suit is *still pending*, and no reason is given for its not being prosecuted, except McCaughan's assertion that there was no hope of getting justice in Texas. This idea is distinctly disproved by Irish's own counsel, who declares, that the courts of justice had set their faces against all species of fraud. It is asserted that slaves could not be sold under *fi. fa.* in Texas. The law restraining sales was repealed. See the record.

Is the plaintiff to have two payments? If he has been *hindered* in his pursuit, *is it to be taken for granted that all recourse is gone, and that the damage is the whole amount of the debt?* In the case of *Macarty v. Landreaux*, ante, 130, the court said; "He would be liable we apprehend, only for the loss really sustained. It is true, that his recourse may have been rendered *more difficult* and expensive, in consequence of the acts of the defendants. Such damages as he may sustain in consequence thereof, he will probably be entitled to recover; but these can be ascertained only after he shall have pursued his mortgage claim; he cannot as yet be said to have suffered any loss." The damages given by the jury are capricious and excessive.

VI. It will be observed that Irish, *though he has recovered a judgment against Wright for the whole face of his claim, is still the holder of the liability of Alsbury, &c., with his right, under the sequestration bond in Galveston, against the very property involved in this discussion.* In any event, the claim against Alsbury should be transferred to Wright, yet no provision is made for this in the verdict or judgment. *This is not a case in which subrogation would accrue by force of law;* and the judgment should be amended accordingly.

Bradford, on the same side.

BULLARD, J. This is an action against John T. Wright, master of the steam-ship New York, to recover of him damages for having knowingly aided and abetted one Alsbury, the plaintiff's debtor, in conveying a large number of slaves belonging to the latter, from the mouth of the Mississippi to Texas, with the design to evade and defeat legal process, whereby the plaintiff lost his debt amounting to \$13,330. There was a verdict against Wright for that amount, and in favor of his co-defendants, part owners of the ship; and from a judgment rendered thereon, after an ineffectual effort to obtain a new trial, the defendant Wright appealed.

The facts are clearly made out. It is shown, that in pursuance

of a previous arrangement between an agent of Alsbury and Wright, which was carefully concealed by the latter, and with a full knowledge of the rights of the plaintiff, and against the earnest remonstrances of his agent, the slaves were taken by Wright and towed in a small vessel to Galveston, thus preventing the levying of an attachment which had issued from the Court of the First Judicial District, addressed to the sheriff of the parish of Plaquemines, which extends to the mouth of the Mississippi. It is not necessary to enter into any detail of the facts. It is sufficient to say, that, in our opinion, the jury was fully justified in concluding, that without the unjustifiable and fraudulent conduct of Wright, the plaintiff would have succeeded in levying his attachment and saving his debt.

The counsel for the appellant, asks the reversal of the judgment on various grounds, which we proceed to notice.

I. It is contended, that the attachment sued out by the present plaintiff against Alsbury, issued improvidently, because the affidavit did not set forth that the debt was really due by Alsbury, the Code of Practice requiring that the time of payment shall have arrived. Art. 242.

The affidavit annexed to the petition, upon which the attachment was issued, is positive and explicit, that the defendant Alsbury is indebted in the sum for which judgment is claimed. The affidavit appears to us sufficient under article 243 of the Code of Practice, which only requires a declaration on oath of the amount due, more especially as by an amendment of the code, by an act of the 7th April, 1836, an attachment may issue where the debt is not due, when the existence of the debt is shown by affidavit.

II. It is contended, that the attachment in the present case against Wright was irregular, inasmuch as it is a suit for damages. We are of opinion that this objection comes too late. The case was at issue on the merits, and the property attached bonded.

III. It is further contended, that the day on which the slaves were taken in tow by the defendant's steam-ship was Christmas, and not a judicial day; that no process could have been legally served on that day; and, consequently, that no such right was defeated. Article 207 of the Code of Practice, provides, that no

citation can issue, no demand be made, no proceeding had, nor suit instituted on Sundays, on the fourth of July, and the eighth of January, of any year. The 25th of December is not mentioned among the days on which no civil process can be served.

The interest of Alsbury in the slaves thus conveyed away and landed in a foreign country, and the question whether that interest was equal in value to the debt due to the plaintiff, and, consequently, whether the plaintiff has actually sustained damage to the amount for which the verdict was rendered, were matters left to the jury, under the instruction of the court. The evidence does not enable us to say that they erred in their finding. If any recovery should hereafter be had in Texas, of which the record furnishes but slender hope, it may in equity be made available to the appellant; but it is no argument, coming from him, that there is a possibility that the plaintiff may yet succeed in making his money out of the slaves thus carried away, by a fraudulent combination between the debtor and the appellant. There is nothing in the case to satisfy us, that the verdict was either capricious or excessive.

The court, in our opinion, did not err in refusing a new trial.

IV. The fourth ground upon which a new trial was asked, is, that the verdict was not rendered with the assent and concurrence of all the members of the jury, but by an abandonment and surrender of opinion on the part of one or more of the jurors, under a mistake and an erroneous impression as to the effect and operation of such verdict, which conduct was improper and illegal, on the part of such juror or jurors; so that impartial justice has not been done in the case.

To support this ground, one of the counsel for the defendants made affidavit, that one of the jurors voluntarily stated to him, that he did not concur with the other jurors in the opinion, that the verdict was just and correct; that, as he then declared to his fellow jurors, he consented to return such a verdict, because otherwise the jury would not have come to any agreement, and under the belief and idea that such verdict would not prejudice the defendant Wright, but that the case could and would be reserved for another court on appeal, and relief extended to Wright, with-

out prejudice to him, and that if he had not entertained such belief, he would not have assented to the verdict.

This is a very lame excuse for assenting to a verdict, and cannot be noticed by us as furnishing any serious ground for a new trial. The juror seems to have forgotten, that he had sworn to give his verdict according to law and evidence. He cannot now be listened to when he gives a reason for his concurrence in the verdict, which is inconsistent with his oath as a juror.

Another ground upon which the new trial was asked, was, that the court refused to charge the jury as requested by the defendants' counsel.

The charge which was given, and that which was refused, appear by a bill of exceptions in the record. The defendants asked the judge to charge the jury, that if the plaintiff's agent was not deceived by any representations of Wright, or if he obtained the desired information from other sources, so that he sustained no injury by the aforesaid misrepresentations, then the jury cannot give damages against Wright; but the judge charged, that if the jury found that Wright had combined with Alsbury, or his agent, in removing from the reach of the plaintiff the property upon which he was endeavoring to enforce his claim, and that, while Wright was thus combining, he deceived the plaintiff as to the fact that Alsbury's property and slaves were to be taken away by him, and, by his assurances that they were not, lulled the plaintiff into security, and thereby, prevented him from recurring sooner than he did to legal means for the enforcement of his rights, then the jury ought to find damages against Wright.

We are of opinion, that the court did not err in this charge to the jury. The view of the question pressed upon the judge by the defendants' counsel was much too narrow, and would have been calculated to mislead the jury.

Upon the whole, we conclude, that the case was fairly tried, and that nothing has been shown to justify our disturbing the verdict.

Judgment affirmed.

FREDERICK WILLIAM SCHMIDT v. FREDERICK FREY and others.

Though the negotiability of a note secured by mortgage is not restricted, so far as the personal responsibility of the parties to it is concerned, by its being *paraphed, ne varietur*, by a notary, for the purpose of identifying it, and though want of consideration cannot be opposed to a transferee, for a valuable consideration, before maturity, who received it in the usual course of business, the mortgage given to secure the note does not partake of its negotiability. It is merely assignable, and is subject to all the equities existing between the original parties. *Per curiam*: A mortgage cannot be transferred to a third person, so as to give him any greater right than the mortgagee himself possessed.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* This was an action by Schmidt, a creditor of Zimpel, to annul a conveyance made by Frey to Manouvrier of property belonging to Zimpel, on the ground of fraud and simulation, and to subject the property sold to the payment of plaintiff's claim. There was a judgment below in favor of the plaintiff, rescinding the sale, annulling a mortgage executed by the purchaser, Manouvrier, to secure the payment of certain notes given for the price, and delivering the property liable for the claims of the petitioner and the other creditors of Zimpel, but reserving to the holders of the notes executed by Manouvrier, their recourse against the parties to those notes by reason of their personal responsibility. The holders of the notes appealed from this judgment.

Benjamin, for the plaintiff.

I. Although the holders of the notes may have been ignorant of the facts, they did not receive the notes in the regular course of business, but under suspicious circumstances, such as should have put them on their guard. The notes were given by Frey & Co., to the present holders, in settlement of claims against them; those to Lizardi & Co. and Ganahl & Co., in settlement for bills of exchange. This is not in the usual course of business. The course of business of commercial houses is not to settle protested bills of exchange by mortgage notes, having long terms to run.

II. A mortgage is not negotiable, but only assignable; although the *principal* obligation, that is to say, the promissory note is negotiable, the *accessory* obligation, that is to say the mortgage, is not so. As a general rule, a mortgage cannot be transferred to a

third person, so as to give him greater rights than the mortgagee himself possessed. If Frey had made, as Zimpel's agent, a mortgage in his own favor on Zimpel's property, he evidently could not by an authentic act, transfer validly this mortgage to a third person. He could transfer no greater rights than he himself possessed, and he would have had none whatever. How could he, then, transfer to the appellants a mortgage which, in his own possession, was null and void; and by this transfer give validity to a mortgage which previously was without legal existence? The appellants contend, that this result follows, because the mortgage was given to secure promissory notes negotiable in their nature.

Let us examine this position:—The principle contended for amounts to this, that mercantile instruments in a negotiable form, communicate the character of negotiability to all obligations that are accessory to them. This principle is evidently untenable. The principal obligation may be valid and binding, and the accessory be null. The principal obligation may be voidable, and the accessory be valid. Civil Code, arts. 3004, 3005. A mortgage is analogous in its nature to suretyship. Suppose A., by authentic act, binds himself as surety to B., to pay the note of C.; that, by a subsequent act, B. releases A. from this suretyship, and then transfers the note to a third person with the act of suretyship, such third person being ignorant of the subsequent release,—on what possible ground could it be pretended that such third person could hold the surety liable? Where is the law that renders an authentic act negotiable, so as to shut out the signer of it from defences against third persons, which he would be entitled to against the original parties? Does a mortgage stand on a different footing? Does it change its nature, according to the nature of the principal obligation it secures? Is it *negotiable*, so as to shut out equitable defences against third persons, when it secures a promissory note, and merely *assignable*, so as to admit equitable defences, if granted to secure an open account?

This subject may be presented perhaps in a more striking light. The appellants can certainly have no better right to this mortgage, than if Frey had conveyed it expressly to them, by authentic act. The implied transfer of the mortgage, resulting from the transfer of the notes, can certainly not be stronger, better, nor more efficacious than an express transfer by public act would be. Now, if Frey had gone before a notary and declared that he transferred to the appellants all his mortgage rights on the property contained in the act before Boswell, the court could not listen for an instant to the pretensions of the appellants, because a reference to Boswell's act would at once show, that Frey had no rights, and that the mortgage which he was undertaking to trans-

fer in payment of his own debts belonged to Zimpel. Yet the appellants contend, that the *implied* transfer to them is valid, when it is clear that an *express* transfer would not be so.

III. There is a dilemma from which the appellants cannot possibly escape. They took notes marked, "*ne varietur.*" It has been repeatedly decided, that the mark does not affect the negotiability of notes, and that persons taking them are not bound to refer to the acts with which they are identified. But the appellants either had cognizance of the act before Boswell, or they had not. If they had not cognizance of the act, and did not take the notes on the faith of the mortgage, it is clear, that they cannot complain that the mortgage should be declared null and void, when proven to have been given in fraud. If, on the contrary, they had cognizance of the act, and took the notes, as they pretend, relying on the mortgage, then the very act itself gave them notice that the notes they were taking belonged to Zimpel, of whom Frey was agent, and that, therefore, Frey had no right to them to pay his own debts. It is upon this ground that the judge below decided the case. He said to the appellants; "If you claim under the act, you make yourselves privies to it, and as such are affected by the notice which the act itself affords, that Frey had no right to transfer these mortgage notes, in payment of his own debts. If you do not claim under the act, and are strangers to it, you have nothing to complain of, if it be rescinded as void for fraud."

IV. The counsel for the Union Bank cites Duranton in support of the distinction that, if Frey had transferred to the appellants by *gratuitous* title, the mortgage would be null as to them, even though ignorant of the fraud; but otherwise, if he transferred by *onerous* title. The reason given [is, that donees are contending for gain, and therefore are to be less favored than those who seek to avoid loss.

If this distinction and the reason for it be well founded, we claim a judgment in our favor on this very ground. The record establishes, that the appellants' title is essentially *gratuitous*, that is, the notes were transferred to them to secure a *pre-existing* debt. They gave *nothing* for the notes when they received them. If their mortgage be cancelled, they will be just where they were before—they are contending for a gain at our expense. If they had given value for these notes, at the time of taking them, they might perhaps, with some show of justice, claim favor; but they are endeavoring to *gain* at the expense of Zimpel's creditors, the amount of a desperate claim against Frey, with which Zimpel and his creditors have nothing to do. They are essentially in the same position as the donee cited by Duranton as an example. There is no more reason for taking Zimpel's property from his

creditors, to pay to the appellants debts due to them by Frey, than to pay them any other desperate claims they may have against other debtors.

Grima, for De Lizardi & Co. appellants, contended that if the appellants be considered as *bona fide* holders of the notes secured by mortgage, they are entitled to all the benefit of the mortgage, the transfer of the notes operating a transfer of the mortgage. Civil Code, art. 2621. A notarial transfer was necessary only to entitle the transferee to proceed *via executiva*. Parties acting in good faith cannot be prejudiced by the frauds of others. See the cases in 9 Mart. 89. 12 Mart. 236. 3 La. 241. 11 La. 401, 407.

Denis, for the Union Bank, appellants. Want of consideration in a note cannot be opposed to a *bona fide* endorsee. *Hubbard v. Fulton's Heirs*, 9 Mart. 87. *Fusilier v. Bonnin*, 12 Mart. 235. *Abat v. Gormley*, 3 La. 241. Duranton, vol. 10, No. 575, distinguishes between those who acquire from a debtor by onerous contract, and those who acquire by a gratuitous title. To revoke a contract of the first kind, he states that the party who contracted with the debtor, must be shown to have been an accomplice in the fraud, and that this is not necessary in the second case. The reason given by him for the distinction is, that gratuitous donees are striving to acquire, while the parties to an onerous contract are contending to avoid loss. See Nos. 581, 582, 583 of same volume of Duranton, also 2 Chardon, pp. 128, 132. And see the case of *Foster et al. v. Foster*, 11 La. 401.

G. B. Duncan, for Ganahl & Co., appellants.

MORPHY, J. In the beginning of 1837, C. F. Zimpel, who was largely indebted to the plaintiff and others, departed for Europe, leaving for his agent here, Frederick Frey. The latter took possession of Zimpel's property, and on the 19th of September of the same year, executed before Wm. Boswell, a notary public, two sales, whereby he conveyed a considerable amount of his principal's property to G. P. Manouvrier. The purchaser assumed certain mortgages existing thereon; and for the balance of the price gave four notes of \$3058 33 $\frac{1}{4}$ each, and four other notes of \$9750 each, drawn by himself to the order of and endorsed by E. Johns & Co., payable respectively at nine, fifteen, eighteen and twenty-four months after date, and secured by mortgage on the premises sold. These notes, before their maturity, were passed by F. Frey to the Union Bank, Lizardi & Co., and F. Ganahl & Co. as the agents of Fabre & Merle of New York,

in payment of, or as collateral security for pre-existing debts, which he owed to them. The present suit was brought by the petitioner, a judgment creditor of Zimpel, to annul these sales as fraudulent and simulated, and to subject the property, which was the object of them, to the payment of a balance due to him. The Union Bank, F. de Lizardi & Co., and F. Ganahl & Co., who were not originally cited as defendants, were subsequently made parties to the suit. After pleading the general issue, and the prescription of one year, they aver, in substance, that they are *bona fide* holders of the notes respectively held by them; that they received them before maturity, for a valuable consideration, and in the regular course of trade, without notice of the fraud and simulation set forth in the petition; and that they are, therefore, entitled to all the rights of mortgage and privilege resulting from the notes, and the deeds of sale and mortgage with which said notes are identified. Manouvrier and Frey pleaded the general issue. There was a judgment below annulling and rescinding the sales, ordering the mortgages given by Manouvrier to be cancelled, and restoring the property to the possession of Zimpel, to be subject to the claims of the petitioner and of his other creditors; but reserving to the holders of the notes, any rights they may have against the parties to the same, by reason of their personal responsibility. From this judgment, the original defendants, Manouvrier and Fey, have not appealed; but the Union Bank, Lizardi & Co. and F. Ganahl & Co., have brought up the present appeal.

The facts of the case in relation to the fraud and simulation charged in the petition are so clearly proved by the testimony, as to admit of no dispute. They fully sustain the judgment appealed from; but the counsel for the appellants contend, that admitting the sales made by Frey to be simulated, yet, inasmuch as they are holders in good faith of Manouvrier's notes, secured apparently by a mortgage on the property, they cannot be deprived of that mortgage; and they rely on the various decisions of this court which declare, that the negotiability of a note is not restrained by the circumstance of its being paraphed, *ne varietur*, by a notary public; and that the want of consideration cannot be opposed to a fair endorsee. 9 Mart. 87. 12 Ib. 235. 1 Ib. N.

S. 143. 3 La. 241. Giving to the appellants the full benefit of the rule laid down in relation to instruments in a negotiable form, although they took these notes in payment of, or as collateral security for pre-existing debts, and, therefore, not perhaps strictly in the usual course of trade, it appears to us, that these decisions do not exactly meet the case before us. They establish this rule of negotiability only with regard to the personal responsibility of the parties whose names are on a promissory note; but the question here is, whether the mortgage given to secure the payment of such a note partakes of this negotiability, or is merely assignable, and subject to the equities between the original parties.

It is clear, that a mortgage cannot be transferred to a third person, so as to give him greater rights than the mortgagee himself possessed. If so, does the mortgage change its nature according to the nature of the principal obligation which it secures? Can it be said to be negotiable, so as to shut out equitable defences against third persons when it secures a promissory note, and merely assignable, so as to admit equitable defences, if granted to secure an open account? Whatever be the principal obligation to secure which a mortgage is given, does it not pass to the transferee, such as it existed in the hands of the mortgagee? A principal obligation may be valid and binding, and the accessory be null. If, for instance, to secure a promissory note, A. without any authority, mortgages the property of B., the third holder of such a note could surely acquire no right whatever in the property, although the parties to the note would remain personally responsible to him. The transfer of the mortgage to the appellants, which results from the transfer of the notes they hold, cannot certainly be stronger or more efficacious than an express transfer by public act would have been. Now, if Frey had gone before a notary, and declared that he transferred to them all his mortgage rights on the property as mentioned in the sales executed before the notary, Boswell, it is clear, that the appellants would not be listened to, in an attempt to assert any rights under such a transfer, because a reference to the sales would at once show that the mortgage which Frey had undertaken to transfer in payment of his own debts, belonged to his principal, Zimpel. If such would be the effect of an express transfer, how can it be con-

tended, that they have acquired any rights by the implied transfer, resulting from the mere delivery of the notes? But, it is said, that the appellants took these notes in ignorance of any fraud in the transaction, and that they were not bound to examine the acts of mortgage at Boswell's office. This is true, as long as they are satisfied with the personal responsibility of the parties to these notes, and look only to them; but the moment they assert any mortgage rights on the property under these sales, they at once make themselves privies to them, and are affected by the notice which these acts afford, that Frey had no right to transfer the mortgage notes which belonged to Zimpel, in payment of his own debts. Persons receiving negotiable notes secured by mortgage, cannot be benefited by their neglect to examine the acts with which the notes are identified. The appellants either had cognizance of the sales before Boswell, or they had not. If they had not cognizance of these acts, and did not take the notes on the faith of the mortgage, they cannot complain that the mortgage should be declared null and void, when proved to have been given in fraud. If, on the contrary, they took these notes relying on the mortgage, and examined the sales, they were fully informed that they were taking notes which belonged to Zimpel, and that, therefore, Frey had no right to use them to pay his own debts.

Article 1982 of the Civil Code, which is invoked by one of the appellants, is inapplicable to the present case. The complaint is not that Zimpel, as owner of the property, has given illegal preferences to his creditors; but that Frey, as the mandatary of Zimpel, has made false, feigned and simulated sales of the property, to the prejudice of the creditors of his principal, and has applied the proceeds to his own use. *Petit v. His Creditors*, 3 La. 28.

*Judgment affirmed.**

* *Grima*, for a re-hearing.—There appears to be no analogy between this case and that pointed out as an example in the judgment of the court: "When A., *without authority*, sells the property of B., the third holders of the notes acquire no right to the property, although the parties to the sale remain personally responsible." In such a case, the principle is no doubt correct. But in the present case, it is not contested, that Frey was the duly authorized agent of Zimpel, and that he had full authority to sell and mortgage. He did not, therefore, *sell without authority*. But it is contended, that the sale was a simulated one. Let it be conceded. The fraud existed between the vendor and vendee. The question then arises, and the

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ALLEN S. WIGHTMAN v. THE WESTERN MARINE AND FIRE
INSURANCE COMPANY.

Notice of a loss of property, insured against fire, should be given with as little delay as the circumstances of the case will permit, to enable the insurers to take measures to protect their interests, and preserve any property saved from damage or loss; but the preliminary proof, required for the purpose of adjusting the loss, need not be presented so promptly. The clause requiring preliminary proof is always construed liberally. Where notice of the loss was given immediately, a delay of nineteen days from the date of the fire, is not unreasonable.

Notice of the loss of property insured against fire, and the preliminary proof required, are in the nature of an amicable demand; and to put a party upon strict proof, the want of them should be specially pleaded.

The fact of one of the conditions of a policy of insurance requiring that any claim for a loss shall be sustained, "if required, by the books of accounts and other vouchers" of the assured, creates no implied warranty on the part of the latter to keep books of account, and to be ready to exhibit them when called upon.

Decision in *Marchesseau v. Merchants Insurance Company*, (1 Rob. 438,) as to the evidence necessary to prove a loss under an open policy of insurance, affirmed. To defeat a recovery on a policy of insurance on the ground that the plaintiff set fire to the premises, it is not necessary that the evidence should be such as would convict the plaintiff on a prosecution for arson.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* The plaintiff appealed from a judgment in favor of the defendants. *Lockett* and *Micou* for the appellant.

Maybin and *Grymes*, for the defendants.

GARLAND, J. This is an action on a policy of insurance, against fire, to the amount of \$4000, "on stock in trade, consisting of looking glasses, frames and plates, clocks and jewelry, &c." in a store in Bienville street in this city. The policy is in the usual form, with the usual conditions and hazards on it. The plaintiff alleges, that on the night of the 19th of April, 1841, the store in which his goods were contained was burned, and

only question in this case concerning these defendants: If a simulated or fraudulent sale be made, and notes secured by mortgage be given, can third parties who have negotiated such notes, or otherwise become the *bona fide* holders of them, be prejudiced by the fraud between vendor and vendee, in which they had no agency or concern?

This is not the first time this question has been decided by this tribunal; and I shall confine myself to referring the court to the case of *Foster's Heirs v. Foster's Executors et al.* 11 La. 401.

Re-hearing refused.

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his loss amounted to \$3800, which sum he claims of the defendants. The answer admits the execution of the policy, but denies all the other allegations in the petition, and especially denies that the said "plaintiff has complied with the conditions of said policy, particularly that condition which requires proof of his alleged loss, with a particular account of the same, and sustained by the proper vouchers," as required by the ninth condition of the policy. The answer proceeds to state, "that there are circumstances relating to said plaintiff, and the claim now in suit, which render it the duty of said respondents to resist it, and to demand a rigid investigation, namely, that said plaintiff, in the fall of 1839, hired a room in a warehouse in the city of New York, into which he put wooden clocks, looking glasses, &c., and on the evening of, or about, the 17th of November, 1839, a fire broke out among his articles, which was believed at the time to have been caused by design, and for which said plaintiff was insured. That, on the night of the 13th of March, 1840, said plaintiff occupied a loft in the store of D. Felt & Co., in Chartres street in this city, and on that night a fire broke out in his said loft, which caused much damage, and that said plaintiff was then insured at the Commercial Insurance Company of this city, and that the present claim is presented for loss by fire against these respondents."

The ninth clause of the policy says, that "all persons assured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company, and as soon as possible, to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; and also, if required, by their books of accounts and other proper vouchers. They shall also declare on oath, whether any, and what other insurance has been made on the same property, and until such proofs and declarations are produced, the loss shall not be payable. Also if there appear any fraud or false swearing, the claimant shall forfeit all claim by virtue of this policy."

The evidence shows, that in the month of November, 1839, the plaintiff and two other persons or firms, occupied a store in Water street in New York. He was engaged in the business of

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vending clocks, looking glasses, &c., and occupied a part of the first loft and all the second, and had an insurance for one year on his goods. A fire broke out in the second loft, and caused considerable damage to the building and goods. He had some difficulty in settling with the company, and finally the claim was referred to appraisers or arbitrators, who allowed about one-half of what was claimed. The president of the insurance company in New York says, that he had his suspicions about that fire, but what they were he does not tell us, and, we suppose, they could not have been very strong against the plaintiff, who, he says, is a man of good character, so far as he knows. He also consented to transfer plaintiff's policy from the store in Water street to one in the Bowery, which would seem to imply some confidence in him. Plaintiff had been for eight or ten years engaged in business, and bore the character of a punctual steady man.

In the month of January or February, 1840, the plaintiff came to New Orleans, with a quantity of looking glass plates and frames, clocks, and other articles, for sale. He rented the first loft of a store in Chartres street of Felt & Co., who occupied the first floor as a store, and used the upper lofts for a printing office. He took out a policy against fire, for two months, for about \$6000, in the Commercial Insurance Company, on his stock in trade. A fire broke out in this store, in March, 1840, in the loft occupied by the plaintiff; but it is proved that it was in the night, and that the plaintiff had no key to the store that was known, he leaving every evening before the store on the ground floor was closed, and not returning until it was opened in the morning, and being obliged to pass through the lower store to get to where his wares were stored. A witness was examined, who was in this house when it was burned. He had the key, and, a short time before he discovered the fire, had been below to light a lamp or candle. He says that he heard some one on the steps and in the plaintiff's room below him, but he did not go to see who it was, although he knew he had, a short time before, closed the doors of the store, and had the key in his pocket, and no one slept in the plaintiff's store. The account given by this witness is rather loose and extraordinary, as, from it, the fire had progressed so much before he discovered it, although awake, that he was un-

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able to get down the steps, and was obliged to make his escape through an upper window, sliding down by the water spout. The witness says, that he has no doubt the fire was the work of an incendiary, but cannot say that the plaintiff was the guilty person. The president of the insurance company says, that although he, and the officers of the company, had suspicions as to something being unfair, yet they never could fix upon any facts that would enable them to resist the payment of the loss, and it was settled without a suit. This policy amounted to about \$6000, and did not more than cover the loss.

In the month of November, 1840, the plaintiff again brought from New York to this city, an assortment of looking glass plates and frames, clocks, and other articles, invoiced to nearly \$11,000. He rented the store No. 11 Bienville street for one year, which was a large establishment, and not having use for the whole of it, he sub-leased a part of it to one Newcomb, a furniture dealer, to Treadwell, a commission merchant; and one McIntire, a cabinet maker, slept in the house, and assisted Newcomb in his business. The plaintiff took out the policy sued on. Treadwell had a policy for \$4000, in the defendants' office, on his goods. Newcomb had one for \$14,500, and McIntire had one on his tools, &c., for \$200; and other persons in adjoining stores had policies to the amount of more than \$18,000, all of which were settled by the defendants without suit, so far as we are informed. During the winter, the plaintiff received some other goods from his establishment in New York, and from his correspondents, and sold a great portion of them. In the month of April he proposed to return to the North, and spoke of leaving on different days, but did not do so. He had finally fixed on the 20th of April as the day of his departure, and agreed with the witness, Newcomb, that they should meet that morning to make an inventory of the goods, which he proposed to leave in his charge. The fire occurred about nine o'clock, on the night of the 19th of April, 1841. The evidence shows conclusively, that on that evening, the plaintiff left the store about half-past six o'clock, P. M. in company with two persons; he went with them to Canal street, where one left him; with the other he went to the National Hotel, where he boarded. After tea, the two descended to

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the street, where they waited some short time for another person who had agreed to meet them; the party then proceeded to a billiard table in Common street, where they remained until the alarm of fire was given, with the exception of a space of time of from ten to fifteen minutes, that the plaintiff was absent from the room, saying, when he left, that he was going to one of the private apartments in the City Hotel for a necessary and urgent purpose, it being proved that he had been seriously affected with a diarrhoea for several days previously. McIntire says, that he closed the store himself about dark; he locked it, and afterwards returned and let his dog out, which he had left in the store; he again closed it; he saw nothing wrong at that time; he then carried the key to Newcomb's store in Royal street, where he left it. He then went to the billiard room, where he knew the other parties were to be, and remained until the alarm of fire was given, and he went with them to the place. When the firemen and crowd assembled, they had to break open the doors of the store; and young Newcomb testifies, that the key was in his brother's store in Royal street. The testimony of Banks is, that he was the owner of the store, upon which he had no insurance; that he arrived at the place soon after the alarm was given, where he met McIntire, and accused him of setting the house on fire, which he denied. Banks first said, that the fire began in the back part of the store, on the lower floor, and afterwards swore it was on the second floor. The day after the fire he says, that he met the plaintiff, who told him, that as the store was destroyed, the lease was annulled, and asked for his notes, to which he replied, that he was in a great hurry. Banks then asserted, or insinuated, that the plaintiff set the store on fire; and several witnesses say, that they never heard of such an accusation until he made it. It is evident that this witness testified with some feeling on the subject; and the judge below said, that he placed but little reliance on his testimony. It is proved, that McIntire is a man of good character, as is also the plaintiff, who had a store and clock manufactory in New York, where he had a clerk, who kept his accounts, and that he came to New Orleans with adventures of such articles as he manufactured, and some that he purchased, for purposes of speculation.

The evidence is voluminous, and we have endeavored to extract the most material parts of it. The judge below gave a judgment for the defendants, principally on the ground, that the value of the property was not sufficiently established, and that there was a strong suspicion of fraud on the part of the plaintiff; from which judgment the latter has appealed.

In this court, the counsel for the defendants insist, that the plaintiff cannot recover, as the preliminary proof was not sufficient, and was not presented in due time. The same ground was taken in the court below; but, as it was not pleaded specially, the judge passed it over without particular notice. The answer denies, in general terms, that the plaintiff has complied with the conditions, and made proof as required by the ninth condition of the policy, sustained by proper vouchers. The clause in a policy that requires preliminary proof is always construed liberally. It is made for the purpose of satisfying the assurer that a loss has been sustained, and the proof is not expected to be strictly such as would be received in a suit pending, but such as will satisfy a reasonable mind of the correctness of the demand. Notice must be given according to the policy, and must be within a reasonable time. 7 Cowen, 645. S. C. 6 Prac. Abridgment Am. Cases, 210. 2 Phillips on Ins. 515. Although the policy stipulates that the notice shall be given "forthwith," we do not understand that to mean in an hour, or in any other very brief space of time, but without unnecessary delay. 12 Wendell, 452. And the giving notice of a loss is a different matter from making the preliminary proof, which may be subsequently presented, and generally requires some time to prepare. In this case it is stated, that the notice was given "immediately," and the proofs presented nineteen days after the fire. No objection was made by the company, as to the notice, or delay in presenting the preliminary proof at the time, which goes far to show, that the defendants did not then consider the delay unreasonable; but they said that the loss would not be paid. We have once said, that the notice and proof required is somewhat in the nature of an amicable demand; and that to put a party upon strict proof of it, he should be called upon to do so by the pleadings. We are not prepared to say, that a delay of nineteen days for the purpose of preparing the

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proofs, was unreasonable, notice having been given, and the defendants acting in the sale of such property as was saved from the flames. Notice of a loss should be given with as little delay as the *circumstances* of the case will permit, to enable the assurers to take all proper measures to protect their interests, and to preserve what property may be left from loss or damage; but the preliminary proof, which is presented for the purpose of adjusting the loss, need not be presented so promptly. This we believe to be the meaning of the ninth clause, or condition, of the policy. 10 Peters, 507.

The counsel for the defendants insist strongly that, as one clause of the ninth condition in the policy says, that the account of loss shall be sustained "if required by their books of accounts and other vouchers," that there is an implied warranty on the part of the plaintiff to keep books of account, and to be ready to exhibit them when called upon. As to the above clause creating a warranty, we are not disposed to assent to it; and, if it were so regarded, many policies would be avoided, both on marine and fire risks, as many who insure keep no books at all, their business not making it necessary. Warranties and special conditions in policies of insurance, as a general rule, must be strictly complied with; and we do not feel authorized to extend them by implication, as cases may often arise in which it would be difficult if not impossible, to comply with them. The case before us, is an example. The plaintiff had, for several years previous to this transaction, been engaged in business in New York where he had a manufacturing establishment and a store. He had a clerk in his employ, and there kept his books. It was his practice to make an adventure each winter by shipping various articles to New Orleans, and coming with them himself, to sell for cash. It is not shown that he dealt on credit at all. He had his invoice, so as to know the prices his goods cost him, and, with that knowledge, he could sell them on such terms as he thought proper, and by examination ascertain what quantity he had on hand at any time. The fact is, that the plaintiff did keep a small book, not in a very regular manner, in which was put down the quantity and value of the goods he brought with him to New Orleans, in November, 1840, and received afterwards; also the amount of

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cash received and remitted to New York. This book does not exhibit a very satisfactory account of the daily transactions of the plaintiff, but it affords some insight into them; and as the clause does not specify what books are to be kept and produced, the one in the record, will, in some degree, comply with it. But it does not appear that when the account of loss, with the proof in support of it, was presented, that the defendants required the production of any books to support it, nor have they since asked for them.

The next ground of defence is, that the amount of loss is not proved by sufficient testimony. That is a question we shall not examine now, but will refer to the doctrine laid down in the case of *Marchesseau v. The Merchants Insurance Company*, (1 Robinson, 441, 442,) as to the evidence to show a loss, under an open policy of insurance.

Another ground of defence is, that the plaintiff was the cause of the loss, and the judge below seems to have been of that opinion. In coming to that conclusion, it seems to us, that the judge has assumed as facts, what we cannot consider as proved. He seems to take it, almost as granted, that the plaintiff set fire to his store in New York, in November, 1839, and again to the one in Chartres street in the spring of 1840. He also assumes, that he had a key to the store in Bienville street, at the time of the fire, in 1841. Of these facts, we see no sufficient evidence in the record. It is certainly very remarkable, that the plaintiff should have had his goods burned three times in about eighteen months; yet we cannot say, that that of itself is a sufficient reason to say, that he was the cause of the fires.

The counsel for the defendants contend, that in a case of this kind, they are not bound to produce such evidence as would convict the plaintiff of the crime of arson, if he were on trial for that offence. This we admit to be true; but we cannot assent to the other part of their proposition, that it is sufficient to raise suspicions of guilt, and thereby annul the policy, unless the plaintiff can establish his innocence. If the defendants can establish such circumstances as will, according to the established rules of our jurisprudence, fix a fraud upon the plaintiff, it will, in our opinion, annul the policy. With the views and intentions we now have in relation to the case, we will not go into an analysis of

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the evidence, but will content ourselves with saying, that we are not satisfied with the judgment, and think that justice requires us to remand it for a new trial; and it would be more satisfactory to us if it shall be passed upon by a jury.

It is, therefore, ordered and decreed, that the judgment of the Commercial Court be annulled and reversed, and this case remanded for a new trial, with directions to the judge to conform in the trial thereof, to the principles herein stated, and otherwise proceed according to law; the appellees paying the costs of the appeal.

THE COMMISSIONERS OF THE BANK OF ORLEANS v. ANDREW HODGE.

A *fi. fa.* having been issued on a judgment ordering mortgaged property, consisting of a plantation and slaves, to be sold to satisfy the claim of the mortgagee, the property was adjudicated to a third person, for a certain sum in cash sufficient to satisfy the execution. The *fi. fa.* was returned, and the return showed, that the purchaser had not complied with the conditions of the sale; but he was put in possession of the property, with the assent of the mortgagee, immediately after the adjudication, and was in possession when an execution in favor of a creditor of his own was levied on the property. The purchaser having paid but part of the price due, the plaintiff in the first execution sued out a second *fi. fa.* for the balance, which was also levied on the property. Held, that the adjudication, of itself, transferred to the purchaser all the rights of the party in whose hands the property was seized, (C. P. 690;) that the sale was complete, and that the purchaser became thereby the owner, though indebted to the plaintiff in execution for the price, (C. C. 2586;) that the debt due by the mortgagor must be considered as satisfied by the first sale; and that the proceeds of a crop gathered on the plantation, after the seizure at the suit of the creditor of the purchaser, must be applied, *pro tanto*, to the satisfaction of his execution. C. P. 722. C. C. 457.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

L. Peirce, for the plaintiffs. The question in this case is, whether the execution of the Union Bank, of March, 1841, is to be considered as still pending against the Commagères, and the plantation as in the possession of the coroner under that writ, when the Bank of Orleans issued its writ in 1843. Now the former writ had been executed and returned. Hodge had become the purchaser; had complied with the terms of the sale by pay-

ing to the Union Bank all the instalments then due; had taken possession and retained it; cultivated the estate, put more slaves on it, and gathered two crops by the consent and permission of the Union Bank. If there are subsequent instalments due, another *fi. fa.* should have been issued by the Union Bank against him; but if none were due, a subsequent creditor may surely seize the crops, and obtain a preference over the Union Bank, which had issued no new writ. The plantation could not be sold without paying, or assuming the balance due to the bank; but unless it exercised its rights by seizure, the crops are surely liable to Hodge's other creditors, who are not to have their hands tied while the debtor is receiving ten thousand dollars a year, and to remain without the capacity of realizing their debt from his revenues. Code of Pract. art. 272. Civil Code, art. 2586. *Rodriguez v. DuBertrand*, 1 Rob. 535. *Black v. Catlett*, Ib. 540. *Gallier v. Garcia*, 2 Rob. 319.

Denis, for the appellant, cited Civil Code, arts. 456, 457, 3278, 3367. Code Nap. art. 2133. Code of Practice, art. 401. 19 Duranton, Nos. 254, 260.

SIMON, J. The facts of this case are these. It appears, that on the 15th of March, 1841, the Union Bank of Louisiana, by virtue of a judgment obtained against Michel Commagère and others, condemning the latter to pay to the said bank the sum of \$31,027, with ten per cent interest per annum from the 1st of April, 1837, until paid, and ordering certain property mortgaged to said bank to be seized and sold in satisfaction of said judgment, caused an execution to be issued, directed to the coroner of the parish of Jefferson, whereupon said coroner proceeded to levy said writ upon the property mortgaged, consisting of a plantation, with the buildings and improvements thereon erected, and forty slaves attached thereto, horses, mules, &c. It appears also by the return of the coroner, that the property seized, was duly advertised for sale, when, on the 5th of May, 1841, it was adjudicated in a lump to Andrew Hodge, jr., for the price of *seventy thousand dollars*, payable in cash. The return further states, that the purchaser did not comply with the conditions of the sale, although duly notified.

The testimony shows, that Louis Commagère had moved from the plantation previous to the sale, and that M. Commagère took charge of it for Hodge, who afterwards employed Saul as overseer. Hodge sent down to the place two of his house servants

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and five other hands. The property was assessed in the name of Andrew Hodge, jr., who has been in possession, appearing as owner, since the sale of the coroner, and who paid taxes to the sheriff. Hodge has made two crops on the place since the adjudication, which were sent to New Orleans by order of his brother. The first was a very small one, not sufficient to cover the expenses; but the second produced about ten thousand dollars. Thomas Saul always acted as Hodge's overseer, and has continued in possession. His salary was \$1200 a year, as agreed on between him and Andrew Hodge, who also hired nine negroes from him to work in the field.

It further appears by the testimony of Wm. L. Hodge, who acted as his brother's agent, that a certain amount was paid by the latter on the execution; he does not recollect what amount, but knows it has been paid. The amount paid to the Union Bank was for instalments due, and was so paid on Hodge's own account. The witness states, that he does not know that his brother made any transaction with the Union Bank for the balance of the purchase money on the plantation; but there are now two instalments due amounting to about \$9000, with interest, and if they are paid, Hodge will be entitled to a credit on the balance due, so far as the bank is concerned.

The parties have not thought it proper or necessary to take the testimony of the cashier of the Union Bank, whose evidence might have been obtained and produced, to establish the real state of the transactions or dealings between the bank and Andrew Hodge, jr. since the adjudication; but we find on the back of the second execution issued by the Union Bank against Commagère, and which has been the principal cause of this controversy, the following statement, to wit; "*Credit this writ for amount received on account of the bond, eight thousand seven hundred and sixty-five dollars, and for interest on said bond received, fourteen thousand one hundred and fifty-two dollars and forty-six cents, by which the amount due on the bond is reduced to \$22,260, with interest at the rate of ten per cent from the 1st of April, 1842.*" No credit was endorsed on the first execution, which was for the whole amount of the debt; so that the whole amount paid since the adjudication on the principal and interest

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of the mortgage debt of Commagère, appears to be a sum of \$22,917 46; which, from the testimony of Wm. L. Hodge, was probably paid by Andrew Hodge, jr., in consequence of the adjudication. That such payments were made, appears clearly by the foregoing endorsement. Their aggregate amount makes a part of the price of adjudication, and we are induced to believe that they must be the result of arrangements made between the bank and the purchaser, subsequent to the sale. But as no evidence has been adduced to show what they were, we must take the credit as we find it, as being, under the testimony of Wm. L. Hodge, for payments made by the purchaser on his own account.

The record further shows, that a writ of *fi. fa.* having been put in the hands of the sheriff of the parish of Jefferson, on the 28th of October, 1843, issued in the case of the Bank of Orleans against Andrew Hodge, jr., to satisfy a judgment rendered for a very large amount against the latter, the same was levied on the property purchased of the Union Bank by Hodge, on the 4th November, 1843, and notice of the seizure was served on said day upon the defendant, with a list and description of the property seized. The sheriff states, that he proceeded to the plantation, and found there Thomas Saul, acting as overseer of the defendant. There was no seizure at that time from any other court; and he left Saul in possession of the place. Saul began to cut cane the same day at five o'clock in the evening, having been appointed by the sheriff as guardian of the property while under seizure.

On the 13th of November, 1843, another execution was issued at the suit of the Union Bank against Commagère, for the sum of \$31,027, with ten per cent interest from the 1st of April, 1837, subject to the credits thereon endorsed, which was put in the hands of the coroner of the parish of Jefferson, on the 15th of said month. The coroner went on the place on the 17th, found that sixty hogheads of sugar had been already made, and left a guardian on the premises to mark the hogsheads as they were filled up. He found Saul in possession of it, who told him he was acting for the sheriff of the parish of Jefferson. Saul also said, that the sheriff was in possession of the plantation for the right of Andrew Hodge, jr., and for the crop. The witness states

further, that the sixty hogsheads were already made and gone ; that he had received a note from Mr. Denis, requiring him to act without delay ; and that he did not know that the sheriff had already taken possession of the place, having been informed of it by the sheriff of the parish.

The testimony of the sheriff, who, on the 23d November, had notified Thomas Saul, the guardian appointed by him by a notice in writing, not to deliver up to the coroner the administration and keeping of the property seized or the crop, further states, that he sold ninety hogsheads of sugar on the 5th of December, at 4 $\frac{3}{4}$ cents per pound ; that this sugar was made since the deponent's possession ; and that sixty hogsheads were made before the seizure by the Union Bank.

With this evidence before him, the judge, *a quo*, conceiving that the Union Bank had no right to issue a second execution against Commagère, and to seize the property with which, by these proceedings, Hodge had been invested, overruled the opposition made by the said bank to the sheriff's paying the proceeds of the sale of the sugar to the plaintiffs ; and from this judgment, the Union Bank, after an unsuccessful attempt to obtain a new trial, has appealed.

We concur with the parish judge in the conclusion which he has adopted. The evidence establishes, that the property on which the appellees' execution was levied, had been adjudicated to Andrew Hodge, jr., on the 5th of May, 1841, for the sum of \$7000 cash, which, if paid to the amount due, was to be received by the Union Bank in satisfaction of the execution issued at their suit against Commagère. *Such adjudication, under art. 690 of the Code of Practice, thus made, had, of itself alone, the effect of transferring to the purchaser all the rights and claims which the party in whose hands the property was seized, might have had to the thing adjudged ; and, under art. 2586 of the Civil Code, is the completion of the sale ; and the purchaser becomes the owner of the thing adjudicated.* Here, Andrew Hodge put himself in possession of the property purchased, immediately after the adjudication ; had the property assessed in his name ; and has paid the taxes thereon ever since. The writ was returned by the coroner, who, it is true, stated in his return that the purchaser had

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not complied with the conditions of the sale; but it appears that no other proceeding was had; and that, although the coroner might have exposed to sale anew the property seized, and have adjudged it to another person, as he was authorized to do by art. 689 of the Code of Practice, (*Stoute v. Voorhies et al.*, 4 La. 392,) the property was delivered to the purchaser, who, by the effect of the adjudication, and although indebted to the bank in the amount of the purchase, became vested with the rights of ownership formerly belonging to the defendants in the execution. Thus the sale was complete; and if Andrew Hodge, jr., had paid the price and complied with the conditions of the adjudication, it is clear, that all the rights of the Union Bank against the property would have also passed to him.

But the return shows, that the conditions of the sale were not complied with; and it is urged, that there is no sale, and that the Union Bank had a right to disregard the adjudication, and to issue another execution to finish the proceedings begun under the first, thereby considering said first execution as still pending against the Commagères. Again, the first writ was returned, and the purchaser put in possession; but the evidence shows also, that payments were made subsequently by Hodge to the bank *on his own account*; and if we take the endorsement made on the second writ as correct, it appears, that the payments made amount to a large portion of the price of the adjudication. In what manner and under what circumstances the payments were made, the record does not inform us; and so far as the evidence goes, we must believe, that the money was received by the bank from Hodge, in consequence of the adjudication, and of his having been put in possession of the property as owner. 'The Union Bank undoubtedly knew that he was cultivating the estate, and that he had gathered the crops raised on the plantation. This they permitted him to do for more than two years after the return of the writ; and every thing shows, not only that the Commagères had been divested of their rights of ownership to the property seized, by the adjudication to Hodge, but that the latter having become the owner of the property, was considered so by the Union Bank, who received his money and dealt with him accordingly. It seems to us that, under such circumstances, and

particularly as no steps are shown to have ever been taken by the appellants or any other person, to set aside the adjudication, and bring the property back under the ownership of the Commagères, their former debtors, the debt of the latter, by the effect of the said adjudication, must be considered as being satisfied by the proceeds of the sale of Hodge, and that the bank must now look to Hodge for the payment of the purchase money, and act against him by suit, execution, or otherwise, under their vendor's mortgage and privilege. The property may yet remain mortgaged to secure the stock sold with the plantation; but it is clear, that the appellants have no further claim to set up against the Commagères, by virtue of the mortgage given for the stock loan under which the property was seized and sold, and adjudicated by the sheriff to Andrew Hodge.

Under this view of the case, we conclude, that the second execution of the Union Bank against Commagères was improperly issued; that the rights set up by the bank to the proceeds of the sale of the sugar, *by virtue of their mortgage, as against the Commagères*, cannot be sustained; and that, therefore, the proceeds in controversy ought to go to the satisfaction, *pro tanto*, of the debt due by Hodge to the appellees under the execution by virtue of which the plantation and slaves by which said sugar was produced, were seized and taken possession of by the sheriff. This will be in conformity with art. 722 of the Code of Practice; and with art. 457 of the Civil Code, which says, that "*the fruits of an immoveable, gathered or produced since it was under seizure, are considered as making a part thereof, and enure to the benefit of the person making the seizure.*" Here, the appellants made the seizure; and they acquired the privilege allowed to them by law, for, with regard to the fruits produced by property under seizure, *jus civile vigilantibus scriptum est.*

Judgment affirmed.

HENRIETTE CATHARINE GUÉRIN v. ACHILLE RIVARDE.

After a wife has obtained a separation of property, or a separation from bed and board carrying with it a separation of property, she may alienate any property formerly dotal, and, consequently may ratify any alienation made before the separation. Code of 1808, book 3, tit. 5, arts. 36, 41, 42, 97; tit. 20, art. 59. C. C. 2337, 2342, 2343, 2355, 2410, 2411, 2421, 3490.

Where dotal property has been alienated by a wife who afterwards obtains a separation of property, prescription will run in favor of the purchaser from the date of the separation.

APPEAL from the District Court of the First District, *Buchanan, J.*

D. Seghers, for the appellant. The marriage of the plaintiff having taken place in 1813 it is by the laws then in force that the present controversy must be governed. By the statute of June 7, 1806, it is provided, sect. 10, that "slaves shall always be reputed and considered real estate; shall be, as such, subject to be mortgaged, according to the rules prescribed by law; and they shall be seized and sold as real estate." Bullard & Curry's Digest, page 49.

Our Civil Code of 1808, contains the following provisions; page 328, *et seq.* article 34. The estimated value of immoveables or of slaves settled as a dowry, "does not transfer the property of the same to the husband, unless there be an express declaration to that effect."

Art. 36. "Immoveables settled as a dowry, can be sold or mortgaged during the marriage, neither by the husband, nor by the wife, nor by both together, except &c."

Art. 39. "Immoveables settled as a dowry, may be sold when the sale of the same has been allowed by the marriage contract."

Art. 41. "If, except as above excepted, the wife or husband, or both jointly, sell the dotal estate, the wife or her heirs may cause said sale to be set aside after the dissolution of the marriage, &c." "The wife shall have the same right after a separation of property." "The husband himself may cause that sale to be annulled during the marriage, but in that case he remains however bound for the damages and losses of the purchaser, if he has not declared in the deed of sale that the estate thus sold was a dowry estate."

With exception of this last paragraph as to the husband, the provisions of the present Civil Code, are the same. Vide articles 2335, 2337, 2340, 2342.

Reverting to the questions of law in this cause, it is contended,
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that there was no sale; that the deed of sale executed by the plaintiff and her husband to the defendant, on the 1st of June, 1833, was a nullity *ab initio*, having being made in open violation of the law. *Quod, lege prohibente fit, ipso jure nullum est.* The inhibition of the law is absolute; the exceptions are specified; the case comes within neither of them; and as to the other motives alleged by the defence, they cannot be listened to. *Ubi lex non distinguit, nec nos distinguere debemus.* The plaintiff's right to bring this action is established by art. 41, page 330 of the Code of 1808.

But it is contended that, after the judgment of separation from bed and board (*de corps et de biens*,) she has, in the settlement of her rights with her husband, received the value of the slaves constituted in dowry, to wit; \$2300, being the value at which they were appraised in the marriage contract, and that the receiving of the price of the slaves, after the separation, was a ratification of the sale.

To this we answer :

1. That the notaries who made the settlement and partition between the plaintiff and her husband must be presumed to have been ignorant of the laws of Louisiana, or they would not have allowed the plaintiff in the settlement, the price of property which had not ceased, and could not have ceased to be her own.

As however, she had profited by this blunder in the sum of two thousand three hundred dollars, she tendered to the defendant the amount he had actually disbursed for the price of the slaves, to wit, the sum of \$2250; Record 5486, page 4, and Record 3131 page 96. The sale was made for \$2550, which was received by the plaintiff's husband as stated in the act; of this sum the defendant was repaid \$300, by the sale of the boy Clement, whereby the amount actually disbursed by the defendant was reduced to the sum of \$2250, which the plaintiff tendered by her petition, with legal interest thereon.

2. That the plaintiff's incapacity to alienate her dowry did not cease by the effect of the separation from bed and board. The law is as explicit and as absolute as to the duration of the incapacity, as to the inhibition itself. The inhibition is to last during the marriage. Now the marriage is not dissolved by a separation from bed and board, for neither of the spouses could contract another marriage during the lifetime of the other.

Ratifying the sale, would in fact be alienating, which the plaintiff was and is still as incapable of doing as she was on the day of the sale to the defendant.

A second question presented by this case is, whether the defendant owes fruits from the date of the judgment of separation

from bed and board, or from the date of the judicial demand? The doctrine on this subject is elaborately explained by this court in *Dufour v. Camfrancq*, 11 Martin, 713.

According to the rules there laid down, it is contended that, in the present case, the defendant cannot plead ignorance of the want of right or authority in his vendor to sell, for the deed of sale contains, in clear and explicit language, the express mention that the slaves were settled as a dowry on the vendor by her marriage contract, the date of which, together with the name of the notary, are expressly recited. Nay, the deed of sale itself shows, that he was well aware of the danger he was incurring, for it stipulates a warranty on the part of the husband to indemnify him in case of eviction.

It is therefore contended, that he owes the fruits, that is to say, the hire of the slaves, from the date of the judgment of separation.

The plea of *res judicata* cannot be sustained. There was no plaintiff capable *standi in judicio*. 2 La. 147. To support such a plea there must have been three parties—*judex, actor, reus*.

Canon, for the defendant.

Denis, for the warrantor. Dotal property ceases to be such after a separation of property. Code Nap. arts. 1540, 1549. Code of 1808, p. 327, arts. 16, 29. Code of 1825, arts. 2317, 2330. After such a separation the wife may alienate property formerly dotal, or ratify an alienation of dotal property made before the separation of property. Civil Code, art. 2343. 14 Toullier, pp. 258, 259, No. 233. *Ibid.* p. 274 to 281, No. 253.

SIMON, J. The plaintiff, wife of J. B. Guérin, but separated from bed and board from him, has instituted this action, with the authorization of the judge, *a quo*, to recover six slaves which are in the possession of the defendant, and which she claims as part of her dotal property, illegally alienated and sold by herself and husband to the said defendant previous to the separation.

She alleges, that her marriage with Guérin was celebrated on or after the 25th of October, 1813, on which day a marriage contract was passed and executed between the parties, by which, among other property brought into marriage by the wife, and settled as a dowry or marriage portion, there were five slaves which are named in the petition; that, in June, 1833, the spouses left this country for France, and on their arrival settled in the city of Nantes, where, for divers pre-existing causes by her stated in the petition, she was obliged to sue her husband for a separation from

bed and board ; when, on the 6th of November, 1834, a final judgment was rendered, separating her from bed and board, from her said husband, and authorizing her to prosecute the partition of the community, as well as the settlement of her dotal and paraphernal rights.

She further states, that on the eve of starting for France, her husband prevailed upon her, through fear, to sign an act, before a notary public, dated the 1st of June, 1833, purporting to be a deed of sale to the defendant of seven slaves belonging to her, and making a part of her dowry or marriage portion settled by the said marriage contract, for the price of \$2550, paid to the vendors. That afterwards, on the 10th of June, 1833, one of the slaves was sold by the defendant to one François Sel for \$300, paid in cash to the defendant ; that said slave has since died, but that the six other slaves are still in the possession of the defendant. She further avers, that the pretended sale of the first of June is void *ab initio*, and could produce no effect ; that, in fact, there was no sale, and that she never was divested of her ownership of the slaves.

She further alleges a tender to the defendant of the sum of \$2250, by him actually disbursed in the purchase of the slaves ; a refusal on his part to restore them to her possession, and to pay her the hire they may have produced since the date of the judgment of separation ; and she prays for judgment against him accordingly.

The answer, after pleading the general issue, avers that the plaintiff and her husband, being about leaving permanently for France, when the cholera was raging in New Orleans, applied to him, and prevailed upon him to purchase the slaves in controversy ; that he, defendant, was then advised that said slaves were dotal property ; but that the vendors observed to him, that it would be a dead loss to them not to sell the slaves, &c. ; and that after many days hesitation, the purchase was made for the sum of \$2550.

The defendant further alleges, that soon after the arrival of the spouses in France, they were separated in bed and board, and that the plaintiff returned to this country, after having fully settled her money concerns with her husband, by a notarial act passed on

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the 19th of December, 1834, in which she acknowledges to have received the price of said slaves. He further pleads the exception of *res judicata* against the plaintiff's demand, as resulting from a judgment rendered by the District Court against the plaintiff on the same cause of action, which judgment was appealed from to this court, and the appeal thereof dismissed, in April, 1839. He sets up a reconventional demand for damages against the plaintiff, in consequence of the fraud by her intended and practiced in making the transaction with him, and of the two vexatious suits brought against him, which have been the cause of large expenses and considerable trouble, to the amount of \$2000. Wherefore he prays for a judgment in his favor for the property, and for the damages.

During the progress of this suit, the defendant filed an amended answer for the purpose of calling J. B. Guérin, the plaintiff's husband, in warranty. A curator, *ad hoc*, was accordingly appointed to represent said Guérin as an absentee, in whose name issue was joined by the curator, *ad hoc*, who adopted every means of defence set forth by the defendant in his answer, further pleading the settlement made between the said Guérin and the plaintiff, by act of the 6th of November, 1834, before a notary public, as a bar to this action, &c.

After a full investigation of the plea of *res judicata*, and of the merits of this action, with regard to which evidence was introduced and admitted on both sides, the judge, *a quo*, conceiving that the exception, *rei judicatæ*, was well founded, gave judgment in favor of the defendant; from which, after a vain attempt to obtain a new trial, the plaintiff has appealed.

The present action is a renewal of the plaintiff's pretensions as by her set up in the case reported in 13 La. 218, the judgment in which is now opposed as a bar to this action, under the plea of *res judicata*; but as, from the view we have taken of the principal question on the merits, it has become unnecessary to examine the exception on which the case was decided below, and as the record contains the whole of the evidence which the parties had to produce in support of their respective rights, we are enabled and think proper to make a final disposition of the cause, on the real merits which it presents.

The principal facts established by the evidence, are as follows. The marriage between the plaintiff and Jean B. Guérin, took place in New Orleans, on or about the 25th of October, 1813. By their marriage contract, executed on that day before a notary public, the plaintiff brought into marriage and settled as her dowry, (*apporte en mariage et se constitue en dot,*) among other property, five slaves, to wit: Gertrude, estimated at the sum of \$800, and Lucie and her three children, Marie, Hedy and Obadiah, estimated together at \$1500. The parties continued to live here until the year 1833, when, a short time before their departure for France, the plaintiff, with the authorization of her husband, sold the slaves Marie with her two children, Hedy and her two children, and Obadiah, to the defendant, for the sum of \$2550 cash. The property sold was declared in the sale to be dotal property, according to the marriage contract therein referred to. The spouses went to France and settled at Nantes; where, on the 6th of November, 1834, they were separated from bed and board, by a judgment regularly rendered, authorizing the plaintiff "*à poursuivre le partage de la communauté qui a existé entre elle et son mari, et la liquidation de ses droits et reprises.*" This judgment was executed by the parties repairing before two notaries, and agreeing upon and executing a settlement of the community and of their respective rights and separate property. This act was passed on the 19th of December, 1834, the parties being assisted by their counsel, and recites, among other statements relative to the intended settlement, "*que Madame Guérin a apporté en mariage une somme totale de cinq mille trois cent quatre-vingt dix piastres, valeur en esclaves, bestiaux et crédits.*" This sum corresponds exactly with the amount stated in the marriage contract to be the estimated value of the wife's property. The parties proceeded in the said act to establish the amount of the active means of the community, ascertained to be a sum of 199,098 98-100ths francs; from which, after deducting the amount of the debts due by the community, and the amount of the respective rights of the spouses, there remained a balance in favor of the community of 83,601 76-100ths francs, to be equally divided between them. After this operation, the rights of the plaintiff are first taken in consideration in the

said act, and liquidated at the sum of 74,695 05-100ths francs, said to be "*le total des droits de Mme. Guérin.*" A similar liquidation is made as to the rights of the husband; after all which, the act is closed with the following declaration, made by the parties before signing, to wit: "*De tout ce qui précède M. Lallie et son collègue ont dressé le présent procès-verbal, duquel il résulte que la communauté d'entre Mr. et Mme. Guérin est liquidée, et ces derniers déclarent approuver la présente liquidation, reconnaissant que les calculs en sont justes et exactes, et qu'ils n'ont plus rien à répéter l'un contre l'autre.*" Thus, the plaintiff's dotal rights were liquidated, and satisfied out of the funds forming the active mass of the community, one-half of the nett proceeds of which was also paid over to her, in addition to the amount stated in the marriage contract.

This act of settlement and liquidation was undoubtedly passed in conformity with art. 1444 of the Napoléon Code, from which we have borrowed art. 88, p. 342, of the Code of 1808, and art. 2402 of the present Civil Code, which all require a separation of property to be executed by the payment of the rights and claims of the wife, made to appear by an authentic act, as far as the estate of the husband can meet them; and as the judgment of separation had put an end to the community, it had also become necessary to settle it, and to divide its proceeds between the parties.

From the issues made up in this case, and from the evidence which comes up with the record, the real merits of the controversy may be reduced to one single question; whether the wife can, after a separation of property, or of bed and board, which carries with it a separation of property, ratify the sale previously made of part of her dotal estate?

The marriage of the plaintiff with Guérin having taken place in 1813, it is by the laws then in force, that the present controversy is to be governed.

It cannot be controverted, that at the time the sale to the defendant was executed, immoveables settled as a dowry could not be sold or in any manner alienated, either by the husband or by both together, except in certain cases. This is the purport of art. 36, p. 328, of the Code of 1808, which has been re-enacted in the Civil Code, art. 2337, and is taken from art. 1554 of the

French Code; and they all say that such alienation shall not be permitted, *during the marriage*. Under art. 41, p. 330, of the Code of 1808, corresponding with art. 2342 of the Civil Code, and 1560 of the Napoléon Code, if, except as before expressed, the wife or husband, or both jointly, alienate the dotal estate, the wife or her heirs may cause the alienation to be set aside *after the dissolution of the marriage*, and no prescription shall run *during the marriage* in bar of this right, *and the wife shall have the same right after the separation of property*. The last paragraph of this article appears to modify the preceding expression "*during the marriage*," so as to give to the wife the right of causing the alienation to be set aside after the separation of property, whilst by the preceding one, she could not do so but after the dissolution of the marriage. Thus, the article seems to assimilate the effect of the separation of property to that of the dissolution of the marriage. We find also, with regard to the prescription which the same article says shall not run during the marriage in bar of the right, it is provided, by art. 42, p. 330, of the Code of 1808, which is the same as art. 2343 of the present Civil Code, and art. 1561 of the French Code, that, "*immovables which are a part of the dowry, are imprescriptible during the marriage; they become prescriptible after the separation of goods, whatever be the time at which the prescription began.*" This law, which is a repetition of art. 3490 of the Civil Code, and goes further than art. 59, p. 486, of the Code of 1808, shows conclusively that, under the law governing at the time of the plaintiff's marriage, immovables and slaves given in dower, though imprescriptible during the marriage, may be prescribed for, if there be a subsequent separation of property between the spouses, and that, therefore, a third person who has a just title to dotal property, sufficient to acquire it by prescription, may avail himself against the wife, after the separation, of the prescription necessary to cure the defects of the illegal alienation made *during the marriage*, whatever be the time at which the prescription began, and thereby acquire a good title to the dotal property though illegally alienated in its origin. This is one of the legal effects of the separation of property, which, as Toullier says, vol. 14, No. 253, "*dissout le lien de la constitution dotal, de même*

qu'elle dissout le lien de la communauté." This author considers the words used in the law prohibiting the alienation of dotal property, *during the marriage (pendant le mariage,)* not to mean, *as long as the marriage shall subsist*, for then, they would be inconsistent or in conflict with the other articles, but as applicable to the marriage considered in relation to the property of the spouses, and to cases where such marriage so considered, or rather the legal obligations resulting therefrom, have not been impaired by the separation.

In support of this doctrine, our old Civil Code, art. 97, p. 342, which corresponds with art. 2410 of the present Code, and with art. 1449 of the Napoléon Code, informs us, that "the wife separated in property resumes the free administration of her estate, and that she cannot alienate her immovable (dotal) property, without the consent of her husband or of the judge." And art. 2411 of the Civil Code, goes so far as to provide, that "the wife, whether separated in property or not, cannot, except by and with the consent of the husband, or of the judge, *alienate her immovable effects, of whatever nature they may be*, except in cases where the alienation of the dotal immovable is permitted." Is it not clear, from these laws, that the alienation of dotal property is permitted after the separation of property, provided it be made with the authorization of the husband? The dotal property ceases, by the separation, to be under the control of the husband. It is transferred to the administration of the wife, who becomes thereby enabled to do with it what she pleases, and to dispose of it in the manner she thinks proper. Toullier, *loco citato*, says: "*Donc, la séparation anéantit les effets de la dotalité à l'égard de l'inaliénabilité des fonds constitués en dot, aussi-bien qu'à l'égard de leur imprescriptibilité*," and he thinks that according to the principles of the Code, "*la femme séparée, sous quelque régime qu'elle ait été mariée, recouvre, par la séparation, le droit de vendre ses immeubles avec l'autorisation de son mari ou de la justice.*" See also Delvincourt, vol. 3, p. 114, notes. Sirey, vol. 13, part 2, p. 209, and a decision of the court of Montpellier, reported by Dalloz, *verbo*, Mariage, ch. 2, § 3, art. 3.

We are aware that a contrary opinion is entertained by many other French commentators of celebrity, such as Duranton, Dal-

loz, Favard, &c. ; and that the Court of Cassation has uniformly maintained by its decisions, the doctrine, that dotal property cannot be alienated, even after the separation ; but the articles of our Code above quoted, as having been borrowed from the French Code, are not the only ones containing provisions relative to the alienation of dotal property. We have several articles which are not embodied in the Napoléon Code, and which belong to our special legislation ; for instance, art. 2421, of the Civil Code, permits a sale from the husband to the wife, when the transfer made to her, even though not separated, has a legitimate cause, as the replacing of *her dotal, or other effects alienated*. Articles 2355 and 3287 give a legal mortgage to the wife for the replacing of her dotal effects *alienated* by the husband. Be this as it may, we cannot consent to put on the articles of our Code, the same construction as appears to have been adopted by the civilians whose opinions are contrary to Toullier's. The reasoning of the latter is clear and conclusive. His doctrine destroys the inconsistency that would exist between arts. 2337, 2342, 2343, 2410 and 3490 of our Code ; it explains satisfactorily the meaning of the words "*during the marriage*," relied on by the plaintiff's counsel ; and is, in our opinion, more concordant with the spirit of our laws and of our institutions. There would be a flagrant contradiction between the law that says, that dotal property cannot be alienated *during the marriage*, and that which provides that dotal property *can be prescribed for after the separation of property* ; and it is manifest, that art. 2410, which puts such property under the control and administration of the wife after the separation, and permits her to alienate it with the authorization of her husband or of a court of justice, would thus become a dead letter.

It results from the view we have taken of the question of alienation, that the plaintiff became capable, and was at liberty, after the separation, to alienate her property formerly dotal ; and that she could dispose of it as she pleased ; and it is clear that, if she could do this, she was also fully capable of ratifying any previous alienation of her property. It is true she might have sued for the nullity of the sale made to the defendant, immediately after the judgment of separation was rendered. But she did not choose

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to do so. She preferred receiving from her husband the amount of her rights and claims under the marriage contract. She got the value of her dotal property as fixed by said contract, whether existing or not; and no one can deny that this must amount to a tacit and sufficient ratification. Toullier, vol. 14, No. 233, says: "*L'action en nullité peut être éteinte avant le tems de la prescription, si l'acte d'aliénation fait en contravention au principe de l'inaliénabilité du fond dotal, a été approuvé ou ratifié par la femme, depuis la dissolution du mariage ou la séparation de biens.*" It is also clear, that if the plaintiff had not ratified the sale, and had permitted a sufficient length of time to elapse, before setting up her claim judicially to the property by her alienated, the defendant would have been able to acquire it by prescription after the judgment of separation; and it is obvious that, if his title could be perfected in this manner, notwithstanding the original *dotalité* of the property sold, it may be equally perfected by a subsequent ratification.

We therefore conclude, that the plaintiff has no right to recover the slaves in dispute, and that the judgment of the court, *a qua*, rendered against her on the plea of *res judicata*, should have been so rendered on the merits.

Judgment affirmed.

THE CITY BANK OF NEW ORLEANS and others v. PHILIP
McINTYRE and others.

Where notes held by different persons are secured by the same mortgage, no one of them can arrest a sale of the mortgaged property provoked by a holder of another note. He has no other right to interfere, than to cause the proceeds of the sale to be brought into court for distribution.

The pews in the Roman Catholic Church of St. Patrick of New Orleans, are a distinct property from the church itself, or the ground upon which it stands. Stat. 16 February, 1842, s. 4:

Where a debtor against whom an execution has been issued, makes no opposition to the manner in which the property is sold, when he might have interfered to prevent it, he cannot enjoin the plaintiff in execution, who purchases the property, from enjoying it pending an action to annul the sale.

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APPEAL from the Parish Court of New Orleans, *Maurian, J. C. B. Beverley, Hoffman, Lockett and Micou*, for the appellants.

Canon, Soule and Roselius, for the defendants.

BULLARD, J. This is an appeal from a judgment dissolving an injunction upon motion, and for want of equity on the face of the papers, which had been obtained by the City Bank of New Orleans and the Roman Catholic Church of St. Patrick, to arrest the proceedings of the defendants, under a judgment against the church, upon a mortgage debt. The correctness of the judgment below depends, therefore, on the question, whether the petition discloses sufficient legal ground for arresting the proceedings of the defendants, the allegations therein contained being assumed as true.

The facts alleged are, that the church issued certain bonds to the amount of \$36,000, bearing mortgage upon the church, the lots in New Orleans upon which it is erected, and all its appurtenances. That these bonds have been negotiated to various individuals, of which five, amounting to \$5000, belong to the City Bank. That Philip McIntyre is holder of six of the bonds, amounting to \$6000, on which he has recovered a judgment. That he has obtained several executions upon said judgment, under one of which he caused to be exposed at sheriff's sale, on the 29th April, 1843, (the present petition was filed January 23, 1844,) the unsold pews in said church, without designating in the advertisement, or at the day of sale, the number of pews so sold, or intended to be sold, and without any reference to the number or situation of said pews, whereby bidders may be informed of their real value, thereby deterring bidders at said sale; and that, by direction of said McIntyre, the pews were sold in lump, and that James McIntyre, the brother of the said Philip, purchased all said pews for \$500, on a credit of twelve months, and he claims to be the owner of ninety pews, worth about \$500 each. That in October, 1843, under another writ of *feri facias*, the said Philip McIntyre caused to be advertised all the ground rents due said church upon pews sold to individuals, without designating the number of pews, or to whom sold; and on said sale, by direction of McIntyre, the whole of said ground rents

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were offered together in the lump, and bid in by James McIntyre for \$600, when, in fact, the annual revenue from said pews was above \$1100. These acts are represented to be oppressive, and in fraud of the rights of the other creditors. They further show, that James McIntyre, claiming to be the owner, has instituted suits against a number of persons in the court of Gallien Preval, one of the city judges, and is endeavoring to recover judgments against them, as holders of pews in said church, and thus to deprive the church of the income necessary for the support of its pastor, and the payment of its debts. They further represent, that the said Philip McIntyre has caused to be advertised for sale the four lots on which the church is built, and the improvements thereon, to wit, the church itself, with the exception of said ninety pews and the ground rents; all of which are alleged to belong to James McIntyre, by which exception the whole value of the said premises is destroyed, whereby other bidders will be deterred from attending, and the said McIntyre will be able to obtain said property for a nominal consideration, and the rights of other creditors be defeated. They allege the nullity of these sales, and to prevent further injury state, that an injunction is necessary. They further allege, that they have notice that the judgment has been transferred to Mary Louisa McIntyre, who is made a party. They pray, that the sales be annulled, and that the defendant may be decreed to have no other right against the property than to prosecute his claim concurrently with, and for the joint benefit of the City Bank, and the other bond-holders.

The question whether the sale of the pews and of the ground rent be null, either as it relates to the church or another mortgage creditor, is not before us. That question remains to be tried upon its merits in the court below. Our only inquiry is, whether, pending such an investigation of the rights of the parties, the defendants ought to have been restrained from proceeding to sell the lots on which the church is built, or from exercising any acts of ownership as to the pews and the ground rents.

The two parties, plaintiff, stand in different positions towards the defendants in injunction, and therefore their pretensions must be considered separately. The City Bank is merely the co-creditor, with McIntyre; of the church, their claim being secured by

the same mortgage, and therefore having a right to be paid concurrently out of the proceeds of the mortgaged premises. The church, on the other hand, is the common debtor; as it relates to McIntyre, by mortgage and a judgment in the ordinary form; as to the bank, by mortgage without judgment.

And first, as to the bank. Admitting the right of the City Bank to participate with the defendant McIntyre in the proceeds of their common pledge, it does not follow that they have any other right to interfere than to cause such proceeds to be brought into court for distribution, and not to arrest the sale. The City Bank has no claim on the pews unsold, nor on the ground rents due by those which have been sold. By an amendment of the charter of the church of St. Patrick, passed in 1842, it is declared, that the purchasers of pews in fee simple shall hold them forever free from any liability for debts, and that they shall never be susceptible of any species of mortgage, and that the sale of such pews need not be recorded. Acts of 1842, p. 128. The pews are therefore a distinct property, and when owned by an individual, not liable to be seized for his debts. They are quite distinct from the church, and the ground on which it stands. If the church wardens had sold every pew after the date of the mortgage of the contending parties, it would not have impaired their hypothecary rights. The bank, therefore, has no right to complain of the manner in which the pews have been sold by the sheriff.

How does the matter stand in relation to the church? That corporation complains with ill grace of what might have been prevented by themselves. They knew the number of pews unsold, and can gain no advantage by concealing their knowledge from the defendants. They might have had a fair sale, pew by pew, by interfering for that purpose. There is no equity in their lying by until the pews were sold, and then complaining of an irregularity caused in a great measure by themselves. They do not now aver, that either more or less than the true number was sold. The defendant sold without opposition from the church. The corporation might have purchased the pews and the ground rents, at the second exposure, on a credit of twelve months. They chose to forbear that advantage which

the law allows to judgment debtors. The defendants having purchased, were entitled in the meantime to enjoy the advantages of their purchase, and to enjoy the property as owner.

While we concur with the Parish Court in the opinion that the injunction ought to be dissolved, we think the damages awarded under the act of 1831 and 1833 excessive, considering the very short time that the proceedings of the defendants have been wrongfully suspended. The injunction was obtained in January, 1844, and was dissolved on the 12th of April. The debt itself bears an interest of eight per cent, and no special damages are shown. Under these circumstances, we think two per cent interest per annum, and damages at five per cent, are a sufficient remuneration.

The judgment of the Parish Court, so far as it dissolves the injunction with costs, is affirmed, and so far as it awards damages and interest, it is hereby reversed; and it is further ordered, that the defendants recover of the plaintiffs in injunction and their surety, *in solido*, interest at two per cent per annum, and damages at the rate of five per cent; and that the appellees pay the costs of the appeal.*

* *Lockett and Micou* for a re-hearing. By an act of the Legislature, approved March 10th, 1840, the trustees of St. Patrick's Church were permitted "to borrow money on mortgage of their property." In pursuance of the power thus given, they issued a series of bonds, and granted a mortgage, to secure their payment, upon four lots of ground, "together with the new church and improvements being erected thereon, and all the appurtenances thereunto belonging."

Philip McIntyre being the holder of six of these bonds for one thousand dollars each, and the interest being in default, brought a suit against the church and recovered a judgment. Under the second writ of *fi. fa.* issued on such judgment, he advertised for sale, "Ninety pews more or less remaining unsold," without any other description. The appraised value not having been offered at the first bidding, they were sold, *in the lump*, at the second bidding, to James McIntyre, the brother of the plaintiff, for five hundred dollars at a credit of twelve months.

Under another execution, the plaintiff caused to be sold the ground rents of the pews previously sold by the trustees, amount-

ing annually to more than one thousand dollars, and James McIntyre became purchaser, *in the lump*, for six hundred dollars cash. The plaintiff in execution was further proceeding to advertise and sell the four lots of ground, the church and its appurtenances, reserving the rights of James McIntyre acquired under the previous sales, when his progress was arrested by an injunction granted in the suit now before the court. The City Bank and others, holders of bonds of the same series and secured by the same mortgage with the bonds of P. McIntyre, unite in the prayer for injunction and relief.

It is important to inquire into the nature and extent of the rights conferred by this mortgage upon the holders of these bonds. The church was built under the sanction of a previous act of incorporation, and dedicated as a place of worship. Before the act of mortgage was passed, sundry pews had been sold to individuals, subject to a ground rent, or more properly an assessment of two per cent per annum upon the price, for the support of the curate and other expenses of the church. The property in the unsold pews vested in the trustees, who also received and administered the rents of those that had been sold. The mortgage consequently embraced the lots, the church, the unsold pews and the rents, subject to the charges to which they were subject in the hands of the trustees. The property is all *real* in its nature, or issuing from the realty. The pews form a part of the church; the rent grows out of their use and enjoyment, like the rent of other houses or lots. The mortgage of the principal embraces the accessories and appurtenances. Civil Code, arts. 3249, 3278.

But the owners of the pews sold before the mortgage, have an interest in their pews distinct from that represented by the trustees, and consequently not embraced in the mortgage. Each pew-holder has an undivided right in the use and enjoyment of the church, and a distinct and separate right to the use of his pew. These rights require, that the whole property be preserved in its present condition. The church must stand, and a space around it continue open for light and ventilation. The lots described in the mortgage, form at best a contracted space for such an edifice; not a foot of it could be appropriated to any other purpose without interfering with the enjoyment of the pews and the solemnity of worship. Nor can any other use be made of the property during the recess of religious service. The Catholic Church is always open to the believer; and even were it otherwise, to turn the church into a place of traffic, is a desecration forbidden by propriety.

The individual right of pew-holders is to use the pews; the corporate right attaches to the property in the lots, building and

rents. The mortgage embraced the property vested in the trustees, not the rights previously granted to pew-holders. The pews remaining unsold were embraced, and, after the mortgage, could not have been sold without infringing the rights of the mortgage creditors. The rents like those of other houses are enjoyed by the mortgagor, until sold under the mortgage, and then pass to the purchaser as part of the issues and profits of the property. If we were to suppose, on the contrary, that the mortgage did not embrace the pews and rents, but only the naked property in the lots and church, subject forever to the use of others, the mortgage would be a mere mockery, covering an interest so remote and contingent, that its value would be imperceptible.

Such being the rights conferred by the mortgage, we come to the question, how can they be legally exercised; or, in other words, how the mortgage is to be foreclosed? The act of mortgage gives to each bond-holder the right of proceeding separately, but he must also proceed legally; otherwise, in exercising his own rights, he will infringe those of others.

The rights of the pew-holders under titles of date anterior to the mortgage, cannot be destroyed by the mortgage; the assessment cannot lawfully be diverted from its object and made the source of private emolument; nor can the other pews be sold without imposing upon the purchasers an assessment equivalent to that borne by the other owners of pews. This burthen is imposed not as a debt of the pew-holders, to be paid at all events and to any one holding a transfer of the right, but as a means of support to the curate, and of defraying the other expenses of the church. If the revenue is withdrawn, the services must cease for want of support. If the services cease, the rents are no longer due, the consideration on which they were promised having failed. The trustees could not sell the pews without reserving rents, nor could they divert from their legitimate object the rents reserved. The power to do either, involves the power to change the destination of the property.

Upon the principle, that the trustees could not give to others more than they themselves possessed, the limit of the powers of the trustees must be taken as the limit of the rights of the mortgagees. The legitimate effect of the mortgage is, to enable the creditors by sale to give to the purchaser the title of the trustees. Then the only regular and legal foreclosure under the mortgage would consist of the sale of the entire property, lots, church, pews and rents. The purchaser at such sale would stand in the place of the trustees; he would succeed to the administration of the temporal interests and revenues of the church, subject to the burthens imposed by the charter, by the contracts with pew-holders, and by the dedication of the property to religious worship.

We will now consider whether, in case one of the bond-holders proceeds to sell the property subject to common mortgage in an irregular or illegal manner, the other bond-holders have not the right to require the rescission of the sale. We contend that they have. If by an unusual or irregular proceeding, the property mortgaged is converted to the exclusive use of one of the creditors, the rest certainly sustain an injury. Does the law give them no remedy? The common law maxim is, where there is a right there is a remedy. Our courts uniformly act upon the same maxim; and it is in effect adopted by the code, which enjoins upon the judges to decide according to the principles of equity, when there is no express law. There can be no failure of justice for want of express regulation. But the law expressly says, that the property of the debtor is the pledge of his creditors; and the courts constantly act upon and enforce the maxim. In this case, the maxim is doubly applicable, for the parties have adopted by their convention the rule prescribed by the law. By accepting bonds under the same mortgage, they have voluntarily assumed an equal position.

The law further declares, that any creditor may be relieved from a contract in fraud of his rights, made by a debtor. Any species of contract or contrivance, whether executed by private agreement or judicial sale, the object of which is to give to one creditor a preference over others, or to withdraw property from the pursuit of creditors, comes within the prohibition of the law. If by collusion between the plaintiff and defendant in execution, the property of the latter be sold by the sheriff, in an unusual or informal manner, in order to enable the plaintiff or *his brother* to buy it at a sacrifice, other creditors injured by the fraud, could cause the sale to be annulled. *Muse, syndic, v. Yarborough*, 11 La. 530. If, without the concurrence of the defendant in execution, the plaintiff procures the property to be sold in a manner to deter all bidders but himself, and secure the property at his own price, does not the same rule apply? The injury is the same, and *eadem ratio eadem lex*.

So long as the seizing creditor keeps within the strict bounds of the law, the loss resulting from his process is *damnum absque injuria*, and no one has the right to interfere. Other creditors can only claim a participation in the proceeds of the sale, according to their respective rank and privilege. But if the proceedings be illegal, and the property is consequently sacrificed for a nominal consideration, the recourse upon the proceeds of sale no longer fills the measure of impartial justice. The sale must be set aside, or else redress is refused for a wrongful injury.

The case of *Merwin v. Smith*, 1 Green's Ch. Rep. 182, was a

suit brought by junior judgment creditors to set aside the sale of property made under older judgments. The averments of the bill are set out at length in the report, and it contained no charge of collusion between the debtor and the seizing creditor. The illegalities consisted, among others, of selling the property in such parcels that it was greatly sacrificed. The court, speaking of the right of the complainants to maintain their suit, says; "The complainants being judgment and execution creditors, stand in a position which fully entitles them to be heard, and if the sale made by the sheriff is in any manner illegal, it may be set aside at their instance." We are not aware of the precise point having arisen in this court, but this decision is so reasonable in itself, and coincides so perfectly with the spirit of our codes, that we think the court cannot hesitate to adopt it as sound law.

We come to the conclusion, that the mortgage creditors are entitled to demand the rescission of an illegal sale; and we will now proceed to inquire whether the church has not the same right.

By referring to the transcript of the case of *McIntyre v. St. Patrick's Church*, the court will perceive, that the plaintiff made an attempt under the first writ to recover his money by garnishment in the hands of Messrs. Mullon, Stringer and Donlin. Interrogatories were propounded, and separately and distinctly answered by each of the garnishees. No interrogatory inquired as to the number of pews sold previous to the date of the mortgage, the persons to whom sold, or the amount of rents due by each. No inquiry was made as to the number remaining unsold, or their relative value, or position in the church. Nothing being made by garnishment, McIntyre took a new writ, and levied upon and sold the pews remaining unsold, "ninety more or less," as complained of in the petition. Under another writ, the ground rents, without any designation, were sold. It does not appear by the record, that any effort whatever was made to ascertain the position or number of the pews, or the names of the pew-holders. Whether such an attempt was made out of court, by application of the plaintiff in execution or the sheriff, the counsel now appearing do not know, not having been at that time in the cause. But the court must presume, that records were kept of the numbers of the pews, of their sale and rents. The keepers of these records were within the control of the court; and its process could have been invoked successfully, to procure the proper information. It is then apparent, that the plaintiff in execution used no *legal* diligence to discover, identify and describe the property which he proposed to sell.

Under these circumstances, if irregularities occur by which a defendant is greatly injured and his property sacrificed, is he remediless, because he has not interposed to prevent the sale? Is

he bound, under the penalty of submitting to whatever loss may have occurred, to volunteer information, and to assist the plaintiff in conducting the sale? We respectfully submit, that he is not. The defendant in execution is often unable to give the security necessary to stay a sale. After final judgment, he is in the hands of the law; but while the law exacts strict justice, it requires that justice to be tempered with mercy. In placing its writ and its officers at the disposal of the plaintiff, the law does enough to secure his just rights. It would be hard, indeed, if the defendant were to suffer from any abuse of the powers entrusted to the plaintiff. Equity does not assist him in covering the illegal or oppressive use of process in his hands. He proceeds at his own peril. If the sale be regular and fair, the property passes; if not, there is no alienation, and the rights of the defendant are not divested. *Dufour v. Camfranc*, 11 Martin, 610. *Delogny v. Smith*, 3 La. 421.

No exception is admitted to this rule in consequence of the defendant being notified of the sale. His right to question judicially its validity can only be lost by being expressly waived. Mere laches does not bar a claim; there must be fraudulent dealing or acquiescence. *Drewry on Injunction*, p. 38, Law Library, vol. 36. The same principle applies to a right. Its relinquishment is not presumed; it is not lost by mere inference. A defendant does not lose his right of appeal, by joining in the sheriff's sale of his property under the execution. *Prentice v. Chewning*, 1 Robinson, 72.

In *McDonogh v. Gravier's Heirs*, 9 La. 543, it appears, that execution having issued against Gravier, he surrendered a number of squares and lots to be sold, and furnished a plan on which they were designated. The plan being found incorrect, another was made by the city surveyor at the instance of the purchasers, but as Gravier refused to ratify this plan, the purchasers were left in as great uncertainty as before. Another sale took place under a subsequent execution, one object of which was to perfect the title acquired by the first sale, which Gravier made no effort to prevent. His heirs were notwithstanding permitted to treat this sale as a mere nullity. They were proceeding to sell the property, when McDonogh, the purchaser, enjoined them, and claimed the property as his own. His demand was dismissed.

The case of *Zacharie v. Winter*, 17 La. 79, came up on an opposition to a monition. The sale was attacked for irregularities or causes previously existing; the principal of which was, an act of retrocession, to which the defendant was a party. He was notified of the appraisement on the day of sale, but made no effort

to prevent it. The court did not hesitate, at his instance, to annul the sale.

The same principle prevails in Pennsylvania. In *Rowley v. Brown*, 1 Binney, 61, the defendant was relieved from a sale on a rule to show cause. But on this point we think it unnecessary to cite further authorities. The theory of the monition law and of short prescription against informalities of judicial sales, is based upon the principle, that the neglect of a defendant to interfere and stop the sale does not deprive him of his right to demand its rescission. His waiver of formalities would bind him like any other contract, but mere silence or inaction has never been held sufficient to destroy either his legal or equitable rights.

Having thus established that no considerations either of equity or of law have barred the door of justice to the church or its creditors, we come to the questions upon which the judgment of the court is to be rendered.

The injunction only is now before the court.

The prayer of the petition is, that the sale of the pews and ground rents be set aside as null; that the purchaser be prohibited from exercising any acts of ownership over them, and that until the trial of this suit, the sale of the church and lots be stayed. A successful rule having been taken in the court below to dissolve the injunction, it is now the province of this court to decide in the last resort, whether the injunction shall be provisionally maintained.

The rule is taken upon the ground, that the petition discloses no legal cause for an injunction. Such a rule is in the nature of a demurrer, and takes the facts in the petition disclosed to be true. Although the case is not before the court for final decision, the merits, as shown in the petition, must necessarily be considered.

On an application for an injunction, the merits may be entered into so far as disclosed by the bill, but no extraneous matter can be introduced. *Rose v. Hamilton*, 1 Desaussure, 137.

The case of *Merwin v. Smith*, 1 Green's Ch. Rep., already cited, was before the court, as this case is, upon a rule to dissolve an injunction. The object of the injunction was to prevent titles being made and possession taken under a sheriff's sale. The motion to dissolve was made on filing the answer. The court had to decide upon the equities of the parties as shown by the pleadings; and being satisfied that a *prima facie* case of nullity was made out, maintained the provisional injunction.

To support a motion for an injunction, the bill should set forth a case of probable right, and probable danger that the right will be defeated without the interposition of the court. *State of Georgia v. Brailsford*, 2 Dallas, 405.

City Bank of New Orleans and others v. McIntyre and others.

If the allegations of the petition, when supported by proofs, will entitle the party to the ultimate relief demanded, he must receive the protection of the court until the trial. If grounds are shown sufficient to annul a title, there is just reason to prohibit the intermediate enjoyment of the property—if for a perpetual injunction against a sale, the provisional injunction must be granted of course. Although the decree of the court will not be the same, the case is before it on precisely the same principles as if the defendants had filed their answer, admitting the facts charged to be true, and resting solely upon the law. We therefore proceed to consider, whether the allegations in the petition admitted to be true, entitle the complainants to the relief demanded in its prayer.

If the view we have already taken of the rights conferred by the mortgage and the manner of enforcing it be correct, the proceedings under the execution are radically defective. Rents stipulated only for a special purpose, are attempted to be severed from the property to which they belong, and are claimed free of the services in consideration of which they were promised. Pews attached to the freehold, and susceptible of alienation by the mortgagor, only with the reservation of a rent to fulfil the objects of dedication, were sold and are claimed to be enjoyed free of any charge whatever. But even if the pews and rents be admitted to be liable to the execution, we contend that the proceedings under it have not divested the title of the church.

The sales are void because they were oppressive.

If the pews and rents could be sold separately from the church, there is no legal mode of disposing of them, except in detail. The sale of such objects in gross is ruinous to the defendant. It is a violation of the maxim, *sic utere tuo ut alienum non lædas*, and of the Christian principle adopted in our code, "not to do unto others that which we would not wish others to do unto us."

The pews are alleged in the petition to be worth five hundred dollars each. McIntyre claims to be the owner of some "ninety, more or less," for the price of one. The ground rents stated in the advertisement to amount to one thousand dollars per annum, are claimed for the nominal consideration of six hundred dollars. If the notice of seizure had not been served, or the advertisement had been one day too short, the sales would be null, *McDonogh v. Gravier*, 9 La. 543. *Grant and Olden v. Walden*, 6 La. 628. Yet these are mere formalities, the neglect of which lead to no certain injury, while such a sacrifice of the property of a defendant is directly ruinous. A plaintiff is neither permitted to sell more of the defendant's property than is required to satisfy his demand, nor to sell it in a manner to ensure its sacrifice.

In the case of *Stead's Ex'rs v. Course*, 4 Cranch, 414, the de-

fendant relied upon a collector's sale of 450 acres of land for taxes. The law authorized the sale of "the land of the defaulter, or so much thereof as will pay," &c. C. J. Marshall said; "If a whole tract were sold, when part of it would have been sufficient, the collector unquestionably exceeded his authority."

In the case of *Tiernan v. Wilson*, 6 Johns. Ch. Rep. 413, Chancellor Kent says; "The proposition is not to be disputed, that a sheriff ought not to sell at one time more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand, provided the part selected can be conveniently, and reasonably detached from the residue of the property and sold separately. The justice of this rule is self-evident." After citing cases in point, he proceeds; "The rule must be the same without any positive law for the purpose. It rests on principles of obvious policy and universal justice."

If, in answer to these cases, it is said that the result of the sale shows that too much property was not sold, we answer, that a sale thus conducted is no criterion of value, and that in both of the cases cited, valuable property was sold for a mere nominal price. Pews are not objects of commercial speculation. Those who buy them usually wish to use them, and no man wishes more than one or two. Their value depends greatly upon their position in the church. By selling without designating their position, and in gross, those likely to bid are driven from the stand. So of the rents. Their value must depend upon the responsibility of the pew-holders. To know what the rents are worth, their names ought to be disclosed. By selling them separately, the owners of pews would be induced to bid for the rents due by themselves. The sale in gross puts down competition, and is as wasteful of their value as was the sale of the pews.

But let us look a little further into the views of other courts, as to the duties of sheriffs in disposing of the property of debtors.

"A party who has power to sell, is not bound to sell at once all the property; and in many cases it would be an act of great oppression to do so." *Hewson v. Daggert*, 8 Johns. 335.

"It is a rule of this court to disallow in every case a lumping sale by the sheriff, where, from the distinctness of the items of property, he can make distinct sales. It is essential to justice and to the protection of unfortunate debtors, that this should be the general rule; any other would lead to the most shameful sacrifice of property." *Rowley v. Brown*, 1 Binney, 61.

The case of *Merwin v. Smith*, 1 Green's Ch. Rep. 196, was in many points analogous to the one under consideration. The property of the defendant had been sold in large parcels and under vague and imperfect descriptions, although it does not appear from the report, that the plaintiffs directing the sale became pur-

chasers. They had therefore more equity on their side than the McIntyres in this case. The chancellor said; "This wholesale method of disposing of a defendant's property can never be justified upon any other ground than as being the best mode for making it bring the most money. A property indeed may be so circumstanced, one part so dependent upon the other, as to require a sale in large parcels; but the general rule is, that it must be sold in different parcels if plainly divisible."

In *Woods v. Monell*, 1 Johns. Ch. Rep. 505, Chancellor Kent says; "I have no doubt of the value and solidity of the rule, that where a tract of land is in parcels distinctly marked for separate and distinct enjoyment, it is in general the duty of the officer to sell by parcels, and not the whole tract in an entire sale. To sell the parcels separately is best for the interest of all concerned. The property will produce more in that way, because it will accommodate a greater number of bidders, and tends to prevent odious speculations upon the distresses of the debtor."

The subject from its nature is not susceptible of positive and uniform regulation. A sale by injudicious divisions of one property would be as ruinous, as a sale in gross of another, that ought to be divided. Hence the law imposes upon its officer the duty of exercising a sound and reasonable discretion, both as to the amount of the property seized, its appraisement, and sale. Code of Pract. arts. 651, 676. Whether the property be real or personal, makes no difference, because the reason as to both is the same. The object of the law is to prevent injustice and oppression, and to secure the highest price. The code itself requires, that the property be appraised with such minuteness, that it may be sold together or separately to the best advantage of the debtor, as he may direct. If the debtor does not attend the appraisement and sale, his interests are left in the care of the sheriff, and the court will see, that that officer exercises fairly and impartially the discretion which the law has given him. These principles were recognized by this court in the case of *McDonogh v. Elam*, 1 La. 492, and in the case of *McDonogh v. Gravier's curator*, 9 La. 531.

The sales are void for uncertainty. The number of pews intended to be sold is not stated with precision. They were advertised and sold as "ninety pews more or less." A hundred might be claimed, or if only fifty remained unsold, the sheriff would call for no more. No designation is given of their number, and without extrinsic evidence, the purchaser could not prove title to any single pew in the church. His title is a kind of floating grant; nor would the law lend its assistance in locating it. It is essential to the validity of a grant that the thing

granted be so described as to be distinguished from other things of the same kind. *Blake v. Doherty*, 5 Wheaton, 359.

The advertisement for the sheriff's sale is intended to attract bidders and secure a fair price. The description must be sufficiently definite to inform the public as to the precise property to be offered for sale. In *Carmichael v. Aiken's Heirs*, 13 La. 207, this court held, that the designation of a lot by its number of the square and the name of the fauxbourg was insufficient; and in *McDonogh v. Gravier*, that all the right, title and interest of the defendant in property between four streets was too indefinite.

The Supreme Court of the United States, in the case of a sale for taxes, decided, that in the advertisement, "the property should be so definitely described that no purchaser could be at a loss to estimate its value." "If the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, yet the sale would be void, unless the same information had been communicated to the public in the notice." *Ronkendorff v. Taylor's Lessee*, 4 Peters, 362.

Even judgments are reversed for uncertainty. The law will not permit the party cast to be exposed to an arbitrary discretion on the part of the officer charged with their execution. *Thomas v. Baillio*, 7 La. 410.

Nor is the purchaser relieved by the production of proofs or documents not referred to in the notice. The offer to produce them is evidence of the unfairness of the sale, for the court will infer that the purchaser bid upon knowledge not communicated to the public. If the purchaser and the plaintiff were brothers, the presumption would be strengthened, because the plaintiff directs the advertisement.

The sale of an undivided interest in an estate, referring to the inventory for description, was held to be null. The court said; "This loose proceeding is not a compliance with the statute, and the title to the estate is not affected by it." *Tate v. Anderson*, 9 Mass. 95. "The effect of those proceedings, is to be determined by the sheriff's return, which is not to be supplied or contradicted." "An uncertainty or mistake in any circumstance, essential to a sufficient description of the estate extended upon, or an omission from the return of any essential requisite in the proceedings directed by the statute, is fatal to the title and renders the extent void." *Bott v. Burnell*, 11 Mass. 165.

The same principles and authorities apply to the sale of the rents, and we think establish, that both sales are void for uncertainty.

The petition alleges "the sale of the ground rents and pews to be utterly void, as well by reason of the uncertain and insufficient description thereof, as for divers other informalities in the

proceedings before and at the time of the sale." To this allegation no exception is taken, and the rule to show cause admits it to be true. Then there are other informalities. The complainants have the right of showing them on the trial of the cause. How shall this court say that they are not sufficient to vitiate the sales?

Some of these may be pointed out at once from the record. The sheriff's return will show, that the ground rents were never properly seized. Such property can only be seized by taking possession of the title, or giving notice to the debtor. Civil Code, arts. 2457, 2612-13. This court has very lately decided, that the plaintiff acquired no right by a seizure, unless the sheriff took possession of the property. *Goubeau v. New Orleans and Nashville Rail Road Co.*, 6 Rob. 345. And in case of a debt, unless he took possession of the title. *Simpson v. Allain*, 7 Rob. 500. A sheriff must seize the property he sells, and have it ready to show or point out to the purchaser, &c. *McDonogh v. Elam*, 1 La. 491.

The petition, therefore, does afford grounds sufficient to cause these sales to be annulled. But if it offered only probable grounds of nullity, according to the cases already cited, (*Rose v. Hamilton*, *State of Georgia v. Brailsford*, and *Merwin v. Smith*.) it would suffice to maintain the injunction until trial. Does not the petition afford ground for staying the sale of the church?

The sale of the lots, church, and appurtenances would include the pews and rents. Civil Code, art. 2466. The sale of a theatre would include the boxes. These are not merely accessories, they constitute in fact the beneficial interest which gives value to the property. If no part of the pews had been sold, the purchaser of the church would acquire the whole property and might change its destination. If pews had been sold to others, the purchaser of the church would take their rents, subject to the agreement on which they are to be paid. The sheriff's sale regularly made would confer similar rights.

In the sale which has been arrested by injunction, the plaintiff proposed to sell the church, *with the reservation of the rights of James McIntyre to the pews and rents*. Let us see what is the effect of this reservation. We have endeavored to show, that James McIntyre acquired *no rights*. If we have succeeded, the reservation is null, it must be considered as not written, and the purchaser would take the same interest as if no such reservation had been made. But their invalidity is not yet pronounced; it is only in litigation. If his title to the rents and pews be maintained, the purchaser of the church would take nothing but a naked and valueless interest; if the title be set aside, the purchaser would acquire the pews and rents as a part of the church.

A bid under such circumstances, would be a mere speculation upon the chances of McIntyre's defeat. Bidders would again be driven away by the fear of litigation, and the plaintiff be enabled to acquire the remaining interest for a nominal consideration. The suit for annulling his former purchases would be extinguished by confusion; for if his old title were set aside, he could retain them under the new. A plaintiff in execution would thus be permitted by one judicial sale to cast a cloud upon the title of the defendant, and by a second sale to turn the doubt to his profit, by destroying competition, and acquiring at a sacrifice, rights which he had made valueless to all others than himself.

If an injury is thus to be inflicted upon the church and its creditors, the proper mode of preventing it is by injunction. The broad provisions of the Code of Practice, arts. 298 and 303, give ample powers to the court to prevent illegal action, under an execution, or to prevent any act injurious to the party claiming the interposition of the court. These articles confer preventive powers as extensive as those exercised by courts of chancery. We will, therefore, refer to a few cases and authorities showing the principles upon which those courts grant relief in cases analogous to this.

"A court of equity will control and regulate proceedings on a mortgage so that no injustice be done to either party." "It will require property to be sold in lots or together, as best calculated to bring the highest price." *Suffern v. Johnson*, 1 Paige Ch. R. 450.

"Equity will restrain the doing any act, by which irreparable damage may be occasioned." *Putman v. Valentine*, 5 Ohio Rep. 117.

"Injunction will be granted to prevent a party making use of a legal writ, for the purpose of vexation and injustice." *Colt v. Cromwell*, 2 Root, 109.

"Any fact which proves it to be against conscience to execute the judgment, will be ground for an injunction." *Murine Ins. Co. v. Hodgson*, 7 Cranch, 332.

"As the court sometimes exercises its jurisdiction for the purpose of removing a cloud from the complainant's title to real estate, it may also, in a proper case, interpose its authority to prevent the illegal act from which such a cloud must necessarily arise." *Oakley v. Trustees of Williamsburg*, 6 Paige's Ch. R. 265.

"The jurisdiction of this court to set aside deeds and other legal instruments, which are a cloud upon a title to real estate, and to order them to be delivered up, appears now to be fully established. If the court has jurisdiction to set aside a sale, &c., it seems to follow that it may interpose its aid to prevent such shade being cast upon the title, when the defendant evinces a fixed de-

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termination to proceed with the sale." *Pettit v. Shepherd*, 5 Paige Ch. R. 501.

In the case of the *Bank of the United States v. Schultz*, 2 Ohio R. 506, the court was unanimously of opinion, "that an injunction should be granted to prevent a sale under execution, where such sale would not at law confer a title upon the purchaser, and its only consequence would be to embarrass the title of the complainants." The same principle is recognized in the same court in the case of *Norton v. Beaver*, 5 Ohio Rep. 179.

The general principles upon which courts of equity are governed in such cases, are well stated by Judge Story; "Injunction is granted upon the sole ground that from certain equitable circumstances, of which the court has jurisdiction, &c., it is against conscience that the party inhibited should proceed. The object therefore really is to prevent an unfair use being made of the process of a court of law, in order to deprive another party of his just rights or to subject him to unjust vexation." 2 Equity Juris. § 875.

"Indeed the occasions on which an injunction may be used to stay proceedings at law, are almost infinite in their nature and circumstances. In general it may be stated, that in all cases where by accident, mistake, fraud or otherwise, a party has an unfair advantage in proceeding in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere." *Ibid.* § 885.

The organization of our courts relieves us of the necessity of appealing to one for relief from the process of another, but the principles on which such relief is granted are the same as in chancery. What these principles are, we have endeavored to show by numerous references to the decisions of this court and of others, whose opinions together form the highest sources of the jurisprudence of our country. If the proceedings of a plaintiff in execution are irregular and oppressive, they should be stayed. If an apparent title to property has been acquired, from which no profit can result to the claimant, but which occasions embarrassment to the owner, that title will be set aside. If such apparent title, created by one sale, be used to prevent competition at another, the second sale will be prevented. In each and all of these cases, if set forth with proper allegations, and supported by affidavit, an injunction will be granted and maintained until the trial of the cause.

Whether the pleadings present such a case to the attention of the court, and whether the ends of justice will be most promoted by

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dissolving the injunction with damages on the one side, or by maintaining it provisionally on the other, the court is now to decide.

Re-hearing refused.

MARIE JOSEPH BEAULIEU and others v. FREDERICK FURST and others.

A party in whose favor judgment had been rendered in a court of original jurisdiction on an application for an order of seizure and sale, caused the mortgaged property to be sold pending a devolutive appeal, and purchased it himself, crediting the execution by the price. The judgment having been reversed on appeal and the case remanded for a new trial, on a rule taken by defendants on the plaintiff, to show cause why the sale should not be rescinded: *Held*, that the court properly ordered the rule to be made absolute and the sale rescinded, unless the price of the adjudication was paid into court within a fixed period; and that the right to rescind the sale could not be affected by any judicial mortgage in favor of a creditor of the purchaser, the eviction of the latter by a superior title relieving the property from all mortgages acquired under him.

APPEAL from the District Court of the First District, *Buchanan, J.*

Peyton and I. W. Smith, for the plaintiffs.

L. C. Duncan, for the appellant, Furst.

L. Janin, for the appellants, J. and L. Garnier. The question here presented is, whether, when a judgment has been rendered in the first instance, under which property of a debtor is seized and sold, and this judgment is reversed on appeal, the sale is null and the property reverts to the defendant?

The case of *Baillio v. Wilson*, decided in October, 1826, (5 Mart. N. S. 214,) is directly in point. In that case Judge Porter said (p. 224,) after one of these luminous discussions by which he exhausted the subject.—

“It is now upwards of twenty years since those statutes were passed. So far as our experience has extended, this is the first time that an attempt has been made to set aside sales made under judgments which were afterwards reversed, and yet the cases must have been numerous where there were strong motives to do so. This long acquiescence under the construction which we adopt, is a principal argument to show its correctness. It proves how these laws have been understood by the profession.”

How much truer is all this now ! Not a single case is to be found in the reports, subsequent to that of *Baillio v. Wilson*, in which the question has been made. The laws referred to in that decision have been embodied without the least change, in the Code of Pract. arts. 575, 578, 624, 690. See also the case of *Brosnaham et al v. Turner*, 16 La. 440.

This is a stronger case in favor of our position than that of *Baillio v. Wilson*. There, the contending parties were the parties to the original suit in which the execution issued. The Baillios had purchased the property, on an execution issued no the judgment which was afterwards reversed on appeal. They were still in possession of it at the trial of the new suit ; no other party had acquired an interest in it, and still the court refused to annul the sale. Here, on the contrary, the creditors of Furst have acquired a mortgage on the property, by recording their judgment ; and they have seized it in execution. According to the appellees, the property, though apparently free from mortgage, could neither be mortgaged nor sold by the purchaser, without exposing his own vendees to the dangers of a suit of which they had no notice.

GARLAND, J. This case was before us in December, 1842, when the judgment was reversed, and the cause remanded for a new trial. 3 Robinson, 345. During the pendency of that appeal, which was devolutive in its character, Furst, the plaintiff in the original suit, took out an execution, and on it had the land alleged to be mortgaged, sold, and purchased it himself, in the month of April, 1842. On the 12th December, 1842, the judgment of this court was rendered, annulling the judgment or decree under which Furst purchased the land, and it was filed in the District Court on the 13th of January following, when a rule was taken against Furst, by the counsel for the Beaulieus, to show cause, why the adjudication made in the month of April previous should not be set aside and cancelled, on the ground that the judgment under which it was made, had been annulled and set aside by the Supreme Court. To this rule Furst excepted on the ground, that the proceeding by rule was irregular and illegal, and that the adjudication and sale could only be set aside by a direct action in the ordinary form ; and for answer, in case his exception should be overruled, he averred, that he had acquired a good title to the land in question, by virtue of the adjudication and sale made by the sheriff under his execution ; and further, that creditors of his own had acquired privileges and

claims on the land; wherefore he asked for time to procure evidence, and to notify the parties interested, and to show that the plaintiffs in the rule can take nothing by it. The defendant, Furst, does not appear to have notified any person who was interested to appear, except that his counsel states that he mentioned to the counsel of J. & L. Garnier, who are appellants herein, that such a rule was taken, but no other party appeared in the lower court than Furst.

The exception was overruled, and upon the trial, the counsel for the Beaulieus gave in evidence the documents necessary to show that the judgment under which the sheriff made the adjudication and sale had been annulled and reversed. On the part of Furst, the execution under which the sheriff acted, with his return thereon and deed, was given in evidence. A certificate of the recorder of mortgages for the parish of Jefferson was also introduced, which states, that on the 4th day of the month of January, 1843, a judgment rendered by the Commercial Court of New Orleans, in favor of J. & L. Garnier against Furst, for the sum of \$6000, subject to a small credit, was recorded in said office; and a notice of seizure under an execution issued upon said judgment, dated January 18th, 1843, was also presented.

In the sheriff's deed it is stated, that Furst became the purchaser of the property for \$3400, payable cash, of which sum, \$620, 62 was received for costs, and the balance of the price of the adjudication, being \$2779 38, was retained by said purchaser on account of his judgment, he being the plaintiff in the suit.

Upon these facts the court ordered, that Furst should, within ten days, pay into court the price of adjudication, as stated in the deed, or, in default of his so doing, that the rule should be made absolute, and the sale and adjudication annulled. From this judgment Furst has taken a devolutive appeal, as have J. & L. Garnier, who set forth that they have a judgment duly recorded, and are injured by the judgment rendered against Furst.

As between the plaintiffs in the rule and Furst, there cannot be a question as to the correctness of the judgment of the District Court. That Furst cannot have a good title to the land, and at the same time retain the price as a credit on a judgment which has been annulled, is too clear to admit of argument. He must

either pay the price, or give up the land, and await the judgment of the court on the principal demand. This case is materially different from that of *Wilson v. Baillio*, 5 Mart. N. S. 214, and as a consequence, the judgment must be different.

As between the appellants, Garnier, and the appellees, we think the case is equally clear in favor of the latter. Admitting these appellants to be judicial mortgagees, as stated by them, their rights rest entirely upon the fact that Furst has a title to the property in question. If that be void, all rights acquired upon the supposition of the title being valid, become void also, and the mortgage must fall with the title. The eviction of a mortgagor by a better title than that under which he holds, relieves the property from all liens acquired or granted under the impression that the title was good.

It is therefore ordered, that the judgment be affirmed; the appellants paying the costs of their respective appeals.

SUCCESSION OF THOMAS DURNFORD—McDONOGH, Curator, Appellant.

Under the Code of 1808, conventional interest could not be recovered, unless the amount had been fixed in writing. Testimonial proof was inadmissible, to prove an agreement to pay such interest. Book 3, tit. 10, art. 32.

Where an authentic act acknowledging a balance to be due, is silent as to the payment of interest, receipts signed by the creditor, acknowledging the payment of instalments of conventional interest "as per agreement," found among the papers of the debtor after his death, are not written evidence of an agreement to pay conventional interest on such balance, nor a recognition in writing of any existing agreement to pay it.

The obligation of a vendor, under his warranty, must be determined by the law in force at the time of the sale.

Where a judgment has been rendered in the Supreme Court in favor of the plaintiff, in an action against the purchaser of land instituted by a third person claiming to be its owner, the purchaser must be considered as evicted from the date of the order for the execution of the judgment made in the court below, and the value of the property at that time is the measure of the damages due for the eviction—not its value at any subsequent period when the owner may take actual possession. Code of 1808, book 3, tit. 6, art. 57.

Heirs represented by an attorney of absent heirs appointed by a court, are not heirs "*represented in the State*," within the meaning of art. 122 of the Code of

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Practice, which declares, that "all actions may be brought against vacant successions, when all the heirs are absent and not represented in the State, provided they be instituted against the curator." The representation which it contemplates is that of an agent, or curator duly appointed; and when the absent heirs are not so represented, a judgment rendered against the curator of the vacant succession, is as valid against the succession as if rendered against the heirs. C. P. 123. C. C. 1205.

Where the curator of a succession claims in his account rendered to the Probate Court, an amount as damages for an eviction from land sold to him by the deceased, the allowance of which is opposed by the heirs, that court has jurisdiction of the questions whether there was a warranty and eviction, and as to the amount of the damage. A Probate Court may inquire into the title to real estate, when necessary to enforce its admitted jurisdiction. Nor will the fact of the right to damages being unliquidated, be any obstacle to their being claimed and allowed in compensation of any amount due by the curator to the succession. It is not necessary that the damages should have been previously liquidated in an action by the curator against the heirs.

Pleading in compensation should be favored, as it tends to prevent the unnecessary multiplication of suits.

Appellant, while acting as curator of a vacant succession, was evicted from land purchased by him from the deceased, and in his account he credited himself with the amount claimed as damages for the eviction. On an opposition by the heirs, on the ground of prescription: *Held*, that until they appeared and claimed the succession the curator was its legal representative, and could not enforce a demand, in his own favor, against it; and that to the extent of the funds in his hands, his claim was compensated, and might be opposed to the claims of the heirs by way of exception, even if incapable of being enforced in a direct action.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

GARLAND, J. In the month of May, 1826, Thomas Durnford died, and in a short time after, McDonogh, who was a large creditor, became the curator of his vacant succession, and proceeded to administer it. He, from time to time, presented his accounts to the Court of Probates, but failed to have them regularly homologated; but was by the Judge of Probates continued in office until the early part of the year 1843, when the heirs of Durnford presented themselves, were acknowledged, and called on the curator to render a final account, which he filed a short time after, referring to his previous accounts in the Court of Probates, as a part of, and explanatory of his whole account and administration. From these accounts it appears, that McDonogh had paid all the debts of the succession, except a balance claim-

ed to be due to himself which stood open, amounting to \$33,904, 04. These accounts were opposed by the attorney for the absent heirs as being generally incorrect, and particularly, because a fee of \$300 was not allowed to him for his services. Shortly after this opposition was filed, the heirs appeared by their counsel, and also filed an opposition generally to all the accounts, with special objections to different items. On the trial of the case, by the withdrawal of the various objections and the admission of many items in the accounts, the matters in dispute were reduced to a few claims.

A. *Hennen*, for the appellant. McDonogh claims damages for eviction from a tract of land purchased from the intestate, Thomas Durnford; and interest at the rate of ten per cent per annum.

1. The sale was made under the old Civil Code, and therefore, must be governed by its provisions. *Fletcher's Heirs v. Cavelier*, 10 La. 116. The old Code, p. 355, art. 57, gives the increased value of the property, at the time of the eviction, as the rule of damages; however much increased by time, without the act of the vendee. This rule went beyond the Roman and the French law, and was repealed on the suggestion of the compilers of the new Code. See *Projet* in English, p. 74; in French, p. 308. *Touillier*, tom. 6, No. 285. *Troplong, Vente*, Nos. 507, 506. *Duranton*, tom. 16, No. 295. But it is the rule given also by the Code Napoléon, art. 1633. See 13 La. 143 and 148. *Morris v. Abat*, 9 La. 552.

2. When did the eviction take place. Not until the judgment had its effect by the actual dispossession of the vendee, that is, on the sale of the land by the *syndic* of *DeGruy*. See *Melançon's Heirs v. DuHamel*, 7 La. 286. *Fletcher's Heirs v. Cavelier*, 10 La. 116. *Pothier, Vente*, No. 89. *Murray v. Bacon*, 7 Mart. N. S. 271. *Troplong, Vente*, No. 419. 2 Febrero, p. 390, No. 41, and No. 44, part 1, cap. 10. Digest, lib. 21, tit. 2, l. 57, with the notes of Godefroy. *Cujas, Recitationes Solemnnes* in *Codicem*, lib. 8, tit. 44, 45, De Evictionibus; in principio, *Opera*, vol. 9, p. 1211, Gomez, Vari. Resol. cap. 2, De Emptione et Venditione, No. 39.

3. The judgment of eviction against McDonogh is valid and binding on the heirs of Durnford, although they were not notified thereof, nor called in warranty; because they do not pretend to prove they had any good defence to the suit. Old Civil Code, p. 357, art. 64. Civil Code of 1825, art. 2494. Code Napoléon, art. 1640. The law established by these Codes has existed for more than five hundred years. See *Tachinasi Controvertiæ*, lib.

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2, tit. 37. The decisions of the courts of Louisiana, have given an uniform interpretation to the provisions of the two codes. *Sterling v. Fusilier*, 7 Mart. 443. *Johnston v. Bell*, 6 Mart. N. S. 384. *Delacroix v. Cenas*, 8 Mart. N. S. 356.

4. Interest at ten per cent is claimed by McDonogh, on his account until payment should be allowed; because, by the receipts found among the papers of the succession, it appears, that interest at that rate had been allowed by the intestate. Interest is due by art. 989th of the Code of Practice. *Andrews v. Wither's Heirs*, 6 La. 360. Interest once stipulated, continues to run without demand, until the final payment of the principal. *Barbarin v. Daniels*, 7 La. 479. Civil Code, art. 1931. "Writing is not of the essence of a convention to pay a particular rate of interest." *Delacroix v. Prevost's Exrs.* 6 Mart. 276. Oral evidence only is excluded; interrogatories may be put to the party, or to his executors, to prove the agreement. The payment of interest by Durnford is proved by the receipt he held, given by McDonogh. The presumption then is clear, that he owed it. If he owed it, then he must have promised it; and if he promised it, then the promise continues until the payment of the principal.

If Durnford had sued McDonogh on these receipts, to repay him the excess of legal interest, no recovery could have been had. But McDonogh, reconvening for his debt and interest at the rate of ten per cent per annum, would certainly have been sustained in his demand. See Mascardus, De Probationibus, Conclusio, 436, 1244, 1325. *Promissio probatur ex implemento promissi. Solutio præsумitur facta vigore præcedentis obligationis. Causa talis præsумitur, qualis per effectum demonstratur. Probatio efficacissima dicitur quæ per effectum demonstratur. Solutio declarat præcedentem obligationem. Solutionem ex causa præcedenti factam præsумi.*

Elmore and W. W. King, contra. The court below properly rejected the demand of ten per cent interest. There is no legal proof of an agreement to pay conventional interest. Civil Code, art. 2895. *Poydras v. Delamere*, 13 La. 100. 3 Mart. N. S. 185. *Harrod et al v. Lafarge*, 12 Mart. 26. The notarial act does not stipulate for any interest. No demand has been proved; consequently no interest was due until after the succession was opened. Code of Pract. art. 989. The date of the last receipt is Oct. 12th, 1824. The succession was opened May, 3d, 1826. The lower court erred in allowing interest for this interval.

The court below properly refused to allow the defendant \$21,500 00, as damages for the eviction.

1st. Because, as the heirs were not made parties to the suit for

the eviction, the judgment rendered in that case, is inoperative against them.

The claim set up is a real action (Code of Pract. art. 373,) which must be brought against the heirs in the ordinary tribunals. Ibid. 924, 925, 983. *Everitt v. McKinney*, 7 La. 878. *O'Donnegan v. Knox*, 11 La. 388. *Gill v. Phillips*, 6 Mart. N. S. 305. The action of warranty in the case of eviction is not a personal action for money in the ordinary sense of the term. In every such action the main question to be determined is, whether the vendor conveyed a good title to the vendee. The question of damages is secondary to this. The Court of Probates is not the proper tribunal to pass upon the validity of titles. When a person in possession is sued and calls his vendor in warranty, this latter call is as much a real action as the original suit. The character of the action is not changed by the party's waiting until he is evicted, before suing upon his warranty.

2d. Because this claim is not in a proper position to be maintained in the manner set up by the curator. It should have been liquidated by a suit "*in the ordinary manner.*" Code of Pract. art. 986.

3d. Because the damages claimed are not liquidated, and cannot be set up in compensation of the money collected by the curator. Civil Code, arts. 2205, 2207, s. 2. *Jonau v. Ferrand*, 3 Rob. 365. *Fagot et al v. Porché*, 7 La. 564.

4th. Because the claim is barred by prescription. Civil Code, art. 3492, 3487, 3422. *Davis' Heirs v. Elkins*, 9 La. 135. The curator might have sued by making the attorney for the absent heirs a party. Civil Code, art. 1205. Code of Pract. art. 116. *Poultney's Heirs v. Cecil's Heirs*, 8 La. 421. Prescription began to run from the time when the right of action accrued.

When did the right of action accrue? See Civil Code, art. 2493. Code of Pract. arts. 380, 382.

At all events prescription ran from the date of eviction and is a bar by the lapse of ten years. See *Babin et al. v. Winchester*, 7 La. 470. It becomes then material to fix the date of the eviction in this case. It is not absolutely necessary that the party should be evicted by a writ of possession. The party may submit to a judgment. He may give up the possession, without incurring further costs. 10 La. 120. 7 La. 290. 7 Mart. N. S. 271.

Every judgment is a mandate of the court. Such commands are enforced by executions, writs of possession and sometimes by process for a contempt. These remedial writs only become necessary where the party neglects or refuses to comply with the commands of the court. In the case before the court, there is no evidence that McDonogh was ever in possession, or was ever put out of possession. No writ of possession ever issued. If he

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was not evicted by his acquiescence in the judgment of the court, he never has been evicted to this day. The presumption is, that he gave up his claims to the place upon the rendition of the judgment.

This voluntary execution of the judgment was the only eviction McDonogh ever sustained. That he did voluntarily execute the judgment is apparent from the fact, that no writ of possession ever issued. The only question is, to determine at what time he thus voluntarily gave up his pretensions. In the absence of all proof to the contrary, the reasonable presumption is, that it was immediately after the rendition of the judgment of eviction. If so, the eviction took place in the year 1831.

But there is no evidence that McDonogh ever was in possession of this tract of land. The evidence shows, that it was uncultivated land, and not in the absolute possession of any of the parties.

The property belonged to the estate of De Gruy, and was in the possession of the syndic of that estate at the time of the attempted sale by the sheriff at the suit of Durnford.

The sheriff never made any title to Durnford, nor put him in possession, and Durnford never had any possession under his purchase. The syndic of De Gruy was never ousted of his possession. The sale by the sheriff being illegal, never divested the syndic of his possession. When Durnford transferred to McDonogh, he had no title nor had he possession; therefore, he transferred neither title nor possession to McDonogh. These conclusions result from the fact, that the lands were not in the immediate possession of any one, and from the law which presumes, that the possession accompanies the title. Civil Code, art. 2455. 1 Mart. N. S. 569. 11 Mart. 640. 6 Mart. 564. 5 Mart. 450.

McDonogh then never had any such possession of the tract as rendered it necessary to oust him by a writ of possession. The judgment of the court which pronounced the invalidity of his title, destroyed his constructive possession, the only possession he ever had. That judgment was rendered in 1831. The claim is barred then by ten years prescription.

GARLAND, J. The first question is, whether McDonogh is a creditor or not. That is, we think, clearly proved by the production of an authentic act, in which a balance of \$9763, is acknowledged to be due, by Durnford, under whom the opponents claim. The judge below, therefore, did not err in allowing this sum to the curator.

The next question is, as to interest on the aforesaid sum at the rate of ten per cent, which is claimed by McDonogh. In the no-

tarial act nothing is said about interest, and no written promise to pay it is shown, except, that the curator produces two receipts, signed by himself, dated April 13th, 1824, and October 12th, 1824, which it is proved were found among the papers of Durnford after his death, in which he (McDonogh) acknowledges to have received of Durnford two half yearly instalments of interest on the above mentioned sum, "as per agreement." These receipts, it is contended, amount to an agreement to pay interest at the rate of ten per cent; or are, at least, a recognition in writing of an existing contract to pay it. We cannot regard them in either light. An examination of the terms of the receipts shows, that the agreement to pay interest was a verbal one; for, in acknowledging the receipt of the interest, it is said, it is paid "as per our agreement;" but in describing the debt or sum in which it had been paid, it is said to be on "principal due me from you, as per your acknowledgment in act passed before Mr. De Armas, notary, &c." This debt was contracted whilst the Code of 1808 was in force, which expressly prohibited the recovery of conventional interest, unless the rate was "fixed in writing, and testimonial proof of it is not admitted in any case," Code of 1808, p. 408, art. 32. Such is the provision of the present Civil Code, and our settled jurisprudence. 12 Mart. 21. 7 La. 105. The receipts prove no more than, that up to October, 1824, Durnford was willing to pay interest at the rate of ten per cent; but subsequent to that period they prove nothing. He was not legally bound to pay it; and it is possible he ceased to do so, knowing that he was not bound. The receipts cannot be considered as recognitive acts, as they have none of the legal requisites of such instruments. The judge of the Court of Probates was, therefore, correct, in reducing the rate of interest to five per cent per annum, to commence from the opening of the succession on the 3d of May, 1826, when Durnford died. Code of Pract. art. 989.

The next cause of complaint against the curator is, that he has not collected, or used due diligence to collect a note for upwards of \$16,000, made by a Mrs. Bingham or her daughter, to the order of, and endorsed by Valcour Aime. It is said, that the parties to this note were solvent at the time it fell due, and continue to be able to pay; at least, that Aime is so. The history

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of this note is somewhat remarkable, and it is shown, that various efforts have been made to recover it. A suit is now pending on it, and the counsel engaged in it say, they see no probable chance of a judgment being obtained. On the part of Aime, it is strenuously urged, that the note was obtained fraudulently. The maker of the note long since became insolvent; but the situation of the endorser is better than it was when the note matured. By this settlement the heirs will become possessors of this debt; and, as the defendant is able to pay, they can prosecute it to judgment, if they think proper. The whole question is one of fact, and we see nothing to convict the curator of such negligence as will make him liable. The judge below was, in our opinion, correct in overruling the opposition.

The next ground of opposition is, to a charge of \$21,500, made by McDonogh against the succession, as damages for a breach of warranty, in the sale of a tract of land on the *Bayou des Familles*. In the year 1823, Durnford sold the land to McDonogh for \$4000, with a full warranty. In the year 1830, a suit was instituted by S. Roman, as syndic of the creditors of De Gruy, against Hennen and McDonogh, which was finally decided in favor of the plaintiff, and the defendants lost the land, by a judgment of the District Court of the first district, affirmed by this court, in July, 1831. 2 La. 544. At the time this judgment was rendered, it does not appear that the heirs of Durnford, who now oppose this demand, were in the country, nor had ever made themselves known. They certainly had not made any claim to the succession, which was duly represented by McDonogh, upon whom devolved the defence of the rights of the estate, and also his own, the nominal defendant (Hennen) having disclaimed any title. After the judgment, the syndic of De Gruy took out no process to enforce it, nor to cause himself to be put in possession of the lands until the year 1837, when he sold it at public auction for 21,500, and a person named Hutchinson purchased it, who afterwards sold it to McDonogh. After the judgment in July, 1831, it is not clearly shown whether McDonogh remained in possession of the land, or not. So far as we can ascertain the facts, it is probable there was no actual possession by any one, the land having no improvements on it, except a small cabin and a

few peach trees. This sum of 21,500, McDonogh claims as the measure of damages, it being, as his counsel contends, the value of the land when he was really evicted, that is, in 1837.

The sale from Durnford to McDonogh, took place before the adoption of the present Civil Code, and the contract of warranty between them must be regulated by the provisions of the Code of 1808, (10 La. 117,) which says, (p. 354, art. 57,) "If, at the time of the eviction, the thing sold has risen in value without the buyer having contributed thereto, the seller is bound to pay him the amount of augmentation of value, above the price of the sale." See also, 10 La. 120.

To ascertain the amount of damages on the warranty, it therefore becomes necessary to fix the time of eviction of McDonogh, from the land. Eviction, we are told, "is the loss, or deprivation of the buyer of the thing he has bought, in consequence of the right of a third person established in a competent tribunal." Bouvier's Law Dict. *verbo*, Eviction. Toml. Law Dict., same word. It would, therefore, seem, that the date of the rendition of the final judgment, or order to carry it into effect, when it is rendered by this court, is the time of eviction. The party is then declared to have no title, and he can proceed at once against his warrantor. The Code of Practice, arts. 385, 386, contemplates the rendition of a judgment against the warrantor, at the same time that a judgment is rendered against the principal; but, under some circumstances, it is impossible to do it, and the principle we suppose is not changed thereby. In those cases, where a judgment is rendered, the standard of damages is the value of the thing at the time of the judgment of eviction. We are, therefore, of opinion, that the date of the recording of the judgment of this court in the District Court, and of the ordering it to be executed, is the proper date at which to fix the time of eviction.

The Judge of Probates in his judgment held, that the judgment of the syndic of De Gruy against Hennen and McDonogh, was not obligatory upon the heirs of Durnford, upon the question of eviction, and upon that ground rejected the demand for the \$21,500, being of opinion, that it was necessary for McDonogh to institute a separate action against them to establish and liquidate

mand ; and he relies upon articles 122, 123 of the Code of Practice, and article 1205 of the Civil Code. The two first articles authorize testamentary executors, curators, &c., to appear and defend all actions brought against the successions they administer ; but in real actions, such as those of revendication and the like, the action must be brought against the executors and heirs present or represented. It will be observed, that these articles provide for two kinds of successions, and make some difference between testamentary and vacant estates. Article 122 says, that all kinds of actions may be brought against the curators of vacant estates, when the heirs are absent and not represented in the State. By these last words, "*represented in the State*," we do not understand, that the Legislature meant those heirs represented by an attorney of absent heirs appointed by the court, but those who had caused themselves to be represented by an agent, or a curator duly appointed. This court has said, that the curator of a vacant succession is the proper representative of the heirs ; and, that a judgment against him, in his capacity of curator, is as valid and efficacious against the succession, as if rendered against the heirs. 3 La. 276.

The next question raised by the counsel for the opponents is, whether the Court of Probates has jurisdiction of the demand, as between McDonogh and the heirs. Upon this point, we have no doubt. The action of warranty, though in some degree a real one, is not an action of revendication, as between the warrantor and warrantee, but properly an action on a contract, by which one party agrees to guarantee another against the damage or loss that he may incur, in consequence of the title to the thing sold being found defective or void. It has frequently been held, that a Court of Probates may incidentally inquire into titles to real estate, when it is necessary to enforce their admitted jurisdiction. 15 La. 455. In this case no question of title is raised, as between McDonogh and the heirs. They do not pretend, that the case of De Gruy's syndic was not properly defended, nor, that they possessed, or do now possess, any other means of defeating that action, than were used in its defence. The questions at issue are, whether there was a warranty, an eviction, and the amount

of damage sustained ; and over them the Court of Probates has jurisdiction.

It is further urged by the counsel for the opponents, that the demand set up by McDonogh cannot be offered in compensation, until it is liquidated by a suit between them. We are unable to see the force of this objection. The demands which the opponents have on McDonogh, are as unliquidated and vague as those he presents, and they may all be examined and settled in this case. If this be not true, it would result in giving the opponents a judgment which they might enforce, obtain possession of the money, and leave McDonogh without the means of satisfying any judgment he might hereafter obtain. The plea of compensation is one that should be favored as far as the law will permit, as it prevents law suits, and enables parties in one suit to adjust many difficulties. As soon as the money belonging to the succession came into the hands of McDonogh as curator, and he made a distribution of it, his debt for that sum was extinguished, and by reference to the account, it will be seen, that the interest ceased upon every payment made.

It is, lastly, urged upon us, that the demand set up is prescribed. Upon this point, we think, the reasoning of the Probate Judge is unanswered ; and we concur in opinion with him, that the plea of prescription must be overruled. Until the heirs appeared and claimed the succession, McDonogh was its legal representative, and could not enforce a demand, in his own favor, against it. It was in fact not necessary for him to do so, to the extent of the funds in his hands, for as to the amount of them his claim was compensated, and whenever the heirs appeared to claim that money, he could oppose his claims by way of exception, although he might not be able to enforce them in a direct action. We cannot permit the heirs to remain quiet for a series of years, and then turn about and attempt to defeat a creditor, who has acted as curator, by a plea of prescription.

It is, therefore, ordered and decreed, that the judgment of the Probate Court be affirmed in all respects, except so far as it relates to the demand of \$21,500, set up by McDonogh against the opponents, as the value of the land of which he was evicted by the syndic of De Gruy, and the balance fixed against the curator,

Succession of Durnford.

in which respects the judgment is annulled and reversed, and the case remanded for a new trial, for the purpose of ascertaining, by competent testimony, the value of the land sold by Durnford to McDonogh at the time of eviction, as herein fixed, and of stating the account between the parties when said value is ascertained; the appellees paying the costs of this appeal.*

* *W. W. King*, for a re-hearing. In the argument of the question of prescription as to the claim of McDonogh for damages, it was supposed that the decision would turn upon the date at which the eviction occurred, the counsel for McDonogh contending that it did not occur till 1837, and the counsel of the heirs that it occurred in 1831. This court has decided that the eviction must date from the rendition of the judgment in 1831. If prescription could run, under the circumstances of this case, sufficient time had elapsed to bar the claim of McDonogh. Upon this subject, it is assumed by the court, that "until the heirs appeared and claimed the succession, McDonogh was its legal representative, and could not enforce a demand in his own favor against it." The plea of prescription rests upon the correctness of this position. On behalf of the heirs it is respectfully urged, that McDonogh could have enforced his claim contradictorily with the attorney for the absent heirs; and that this would have necessarily been the case, had he complied with the requirements of the law for the administration of vacant successions.

By art. 1205 of the Civil Code, the counsel for the absent heirs represents them in all acts required by law to be done. This authority is ample, and he must necessarily act for the heirs and represent them, in contesting all claims brought by the curator against the estate. By art. 1114 of the Code, a creditor is preferred to other persons, for the curatorship. By art. 1183, of the same Code, the curator is bound to render an account of his administration at the end of the year. By art. 1004 of the Code of Practice, objections must be made within three days to the curator's account. The account can be homologated after advertisement.

Now, under these provisions, suppose a creditor to be appointed curator. He is required by art. 1142 of the Civil Code to keep a list of all debts due by the estate, and of course of debts due by the estate to him. At the end of the year he must file his account, showing the payments made by him. Suppose he retains a portion of the money to pay the debt due to himself; is not this legal? Could not the judge homologate the account? Most assuredly he could. Not only could this be legally done, but by law it is made his duty thus to render his accounts, including payments to himself as well as to others. The surplus, if there be any in his hands, is to be deposited with the State treasurer. Civil Code, art. 1184. Code of Pract. art. 1009.

The great object a creditor has in view in becoming curator, is to secure the payment of his debt. The law requires that all this shall be done, and the curator's account homologated at the end of one year. This could not be done if the curator could not present any claim against the estate. The law then contemplates that he should present his claim; and this, whether the heirs appear or not. For if the heirs do not appear, the surplus is to be deposited with the State treasurer. Civil Code, art. 1184. Code of Pract. art. 1009.

Vacant estates are generally administered by creditors. The universal practice in the lower courts is, for them to present their claims against the estate, and they are passed on and homologated contradictorily with the attorney for the absent heirs and the other creditors. Without pursuing this course, it would be impossible ever to settle vacant successions in the manner contemplated by the articles of our Codes above referred to. It is not necessary for the settlement of successions that the heirs should present themselves. If they do not, the money goes into the State treasury.

The attorney for absent heirs, stands in the same relation to the curator, that an

THE STATE v. PIERRE SOULÉ.

Where the evidence of a contempt of court is before the court, and the offence palpable, a rule to show cause why an attachment should not be issued, is unnecessary. In such a case an attachment may be issued in the first instance. The practice of taking a rule, arose out of a distinction between direct and consequential contempts, and was resorted to, where it became necessary to procure evidence not before the court.

A court may propound interrogatories to an attorney against whom an attachment has been issued for a contempt, for the purpose of ascertaining whether he was the author of the petition containing the contemptuous language for which the attachment was issued, and his intention and motive in writing it; and the court may require an answer to them. Nor is this right a violation of the provision of the 18th sect. of the 6th article of the constitution, which declares, that "in criminal prosecutions no one shall be compelled to give evidence against himself."

Contemptuous language contained in a petition, prepared by an attorney, for a rehearing of a cause pending before the Supreme Court, though filed with the clerk without a formal motion in court, will subject the offender to punishment for a contempt. Stat. 27 March, 1823, § 3. Such a petition must necessarily pass under the notice of the court, while in session; and, being required by art. 912 of the Code of Practice to be presented when the court is in session, in the absence of proof to the contrary it will be presumed that it was filed according to law.

ON Saturday, the 6th of July, 1844, the following order was entered, by direction of the court, on the minutes of its proceedings:

It is ordered by the court, that an attachment issue, directed to

under-tutor does to the tutor of minors. Civil Code, art. 301. The curator represents the estate in everything, except where his interests conflict with those of the heirs. For such a case was the office of attorney of absent heirs created.

We conclude that the court erred in assuming the position that McDonogh could not present his claim against the estate. Civil Code, arts. 1146, 1183, 1184. Code of Pract. 1009.

As McDonogh could have presented his claim, and as it was his duty to have done so, and he did not, he is barred by prescription.

Prescription runs against all persons, unless they are included in some exception established by law. Civil Code, art. 3487.

Prescription runs against a vacant estate, though no curator has been appointed to such estate. Civil Code, art. 3492. If it runs against a vacant estate, it must also run in favor of a vacant estate. *Elkins' Heirs v. Davis*, 9 La. 136.

The fact is not contested, that McDonogh did not present his claim for damages against the estate for two years.

Re-hearing refused.

the sheriff of the parish of Orleans, commanding him to attach and bring before this court, on Tuesday next, the 9th of the present month of July, at ten o'clock A. M., the body of Pierre Soulé, one of the attorneys and counsellors of this court, to answer for a contempt of this court and its authority, by addressing to it, in his petition for a re-hearing, filed in open court, on the 3d day of July, in the year 1844, the following disrespectful language :

"Your decision on the latter cannot be viewed by the appellees, otherwise than as a deplorable, but too often repeated instance of the favor and protection which the most unblushing fraud and reckless turpitude may find sometimes, if not in the actual impotency of the laws, at least in the levity with which they are administered ; and I do now come forth, in the name and on behalf of those appellees, to demand that you will reconsider your decree, and grant them a re-hearing." See pages 3, 4, of the printed pamphlet, filed.

"Is such a man to be protected by the decree of this court, and to be shielded, in his shameful attempt to ruin his wards, behind a quibble of more than doubtful origin, and which consecrates a most odious, a most immoral, and most revolting legal heresy." See pages 5, 6, of same pamphlet.

"I dare not qualify according to its merits, the contemptuous sneer conveyed by the proposition." See page 7, of same pamphlet.

"I would readily admire the motive, and applaud the instinctive humanity, which has prompted this court so warmly to advocate, in the present instance, the sacred obligations which bind the father to his children, were it not, that your honors seem to have entirely lost sight of other children who possess as good a title, and can plead as respectable a claim to their protection and justice. That their sufferings and ruin should have been disregarded, for the sake of those who seem to occupy such a hot place in your hearts and partiality, is beyond my comprehension ; and although your honors may not be disposed to understand that a father cannot provide for the maintenance and education of his children with means and resources derived from the pocket of others, I shall take the liberty to furnish them with such authorities as will convince the most incredulous, that they have

misunderstood the law and misapplied its provisions." See pages 11, 12, of same pamphlet.

"His Honor, Judge Simon, emphatically declares, that where *co-heirs cannot complain, creditors have no right to interfere*. This we have adverted to as a monstrous heresy, which would stamp any legislation with the most revolting immorality. Let such a principle have its full effect, and the greater the spoliations and frauds, which a father may commit against his creditors, to enrich his own children, the safer will be the spoils in the hands of the latter; because, forsooth, it has seemed clear to your honors, *that if co-heirs cannot complain, creditors have no right to interfere*." See page 16, same pamphlet.

"I abstain from further comments, and close here the prayer of the appellees, with the firm conviction that, after perusing the above remarks, your honors will deem it neither just nor safe to refuse the re-hearing demanded." See page 16, same pamphlet.

It is further ordered that a copy of the foregoing order, and of the interrogatories hereto annexed, be served on the said Pierre Soulé, and that he be ordered to answer said interrogatories on oath, which are as follows;

1st. Are you, or are you not, the author of the printed petition for a re-hearing, filed in the Supreme Court in the case of *Armand and Alfred Mercier v. J. F. Canonge*, their tutor, on the third day of the present month of July, 1844?

2d. Are not the extracts in the foregoing order, from said petition, truly and correctly made?

3d. In writing, or using the language or expressions above quoted, was it your intention, purpose, or motive, either directly or indirectly, to impeach the integrity, character, or motives of the members of this court collectively, or separately, or in any manner to cast any reflection or imputation on the judicial integrity of all, or any one, of said members?

4th. In using the language and expressions hereinbefore set forth and stated, was it your intention, purpose, or motive, either directly or indirectly, to commit a contempt towards this court, or upon its authority, in any manner whatever?

The defendant having been brought into court by the sheriff

in obedience to this order, read the following protest against the proceeding :

"The sheriff has been commanded to attach and bring my person before this tribunal, that I might answer for a contempt of court, alleged to have been committed on the occasion of the re-hearing prayed for in the case of *Armand & Alfred Mercier v. J. F. Canonge*, their tutor. I now come in the custody of the officer who has apprehended me, and stand at this bar, awaiting your further mandate and decision.

"In the meanwhile I most solemnly protest against the arbitrary exercise of authority, whereby you have ordered my arrest without a previous hearing, and in the absence of any cause which could justify, in the remotest degree, the suspicion that I might be found unwilling, or reluctant, to obey your summons.

"I also peremptorily refuse answering under oath, the interrogatories which you have propounded to me. I know of no rule of law which justifies such a proceeding, unless you should consider yourselves as plaintiffs in a suit, instituted against me in the name of the State.

"Admitting, however, that such a rule does exist, I would still be protected against its being enforced in the present instance, by the elementary principle which provides, that *no one shall be asked any question the answering to which might subject him to any the least punishment.*

"Yet it would become neither my dignity as a man, nor my independence as a lawyer, to abstain from avowing openly, that I am the author of the petition referred to in your rule, and that the extracts quoted from the same are literally correct.

"I do, therefore, now enter my most unqualified acknowledgment to that effect.

"As to the bearing of the expressions which I have used—as to my motives, views and object, in applying them as I have done in this case, the petition must speak for itself.

"I am unconscious of having stated a fact which is not in strict accordance with the truth, or of having advanced a doctrine which is not maintained by the most positive enactments of our law, and by the authorities of our ablest and most respected commentators.

"My language may seem discourteous, and perhaps wanting, in some degree, of that respect which ought to surround the judges of this court; but there is an excitement which flagrant injustice, and the temporary triumph of an unhallowed cause, kindles sometimes in one's bosom, that will silence every other feeling but that which resents the injury sustained, and prompts the sufferer to give vent to his ire, and to speak forth his indignation.

"I shall not proceed any further. I feel that I am treading on burning ground; and a higher consideration than that of my personal interest and advantage commands imperiously, that I should not expatiate at any length, on the matters which have brought me before you.

"I stop here, therefore, ready to meet your decree with submission, provided it adjudge nothing which be not within the strict limits of your legal authority and discretion."

On Thursday, the 11th of July, the judgment of the court was pronounced by

GARLAND, J. The defendant, one of the members of the bar of this court, being brought into court to answer for a contempt of its authority and dignity, commences by a protest against his being arrested without a previous hearing, and in the absence of any cause to justify it. He also refuses to answer the interrogatories propounded to him by the court, as he says there is no rule of law which justifies such a proceeding; and that if there be, he is protected by that provision of the constitution which says, that no one, in a criminal prosecution, "shall be compelled to give evidence against himself." He further avows, that he is the author of the petition in which the language and expressions complained of, is contained; and he says, "as to the bearing of the expressions," and the "motives, views and object" he had in applying them as he has done, "the petition must speak for itself." The protest then states some other matters, not presenting any legal question, but which it may be necessary to notice in a subsequent part of the opinion.

The power of this court to punish as contempts, acts calculated to bring the tribunal itself into disgrace, and its authority into disregard, is undoubted. In relation to attorneys at law, a pre-

existing power was recognized by an act of the Legislature, passed in 1823, (B. & C.'s Dig. p. 23;) and is also conferred by articles 131, 132 of the Code of Practice, as well in relation to attorneys at law as to other persons. Blackstone, in the 4th book of his Commentaries, p. 286, says, the power to punish for contempts is as ancient as the law itself. "For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory;" therefore the power to suppress contempts "by an immediate attachment of the offender, results from the first principles of judicial establishments," and is inseparable from them. The same learned writer also tells us; "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, without any farther proof or examination." The process of attachment is intended to bring the party into court; he can give bail when arrested, for his appearance; and in flagrant cases of contempt, it issues in the first instance. 1 Salk. 84. Strange, 185, 564. 1 Yeates' Penn. Rep. 1. 11 La. 596. The practice of taking a rule to show cause why an attachment should not issue, arose out of a distinction between direct and consequential contempts, and where it becomes necessary to procure evidence not before the court; but when, as in this case, the evidence of the contempt is before the court, and the offence is palpable, no rule to show cause is necessary.

The allegation of the defendant, that his arrest is an "arbitrary exercise of authority," is without the slightest foundation in law or in fact. A contempt of court is considered in some degree, as a criminal act; as much so as an assault and battery, a libel, or other offence of that kind. Blackstone, and other writers, treat of it under the head of public wrongs, and say that the trial must be summary, so that the punishment may be prompt, and the character of the tribunal vindicated. The defendant seems to have regarded the charge against him as criminal to a certain extent, when he invoked the protection extended by the constitution to those charged with crimes only. The doctrine is new to us, and, we think, cannot be sustained by any authority, that a party is entitled to a previous hearing before he can be arrested. Arrest, as we understand the law, is a preliminary

to a hearing. The arrest of persons, both in civil and criminal cases previous to their being heard, is a thing that occurs daily; and, we suppose, it is the first time the idea has been suggested, that before a magistrate can issue a warrant, or a court order a writ of arrest, the party against whom it is proposed to direct such process must have "a previous hearing." To authorize the issuing of warrants or writs of arrest, the tribunal directing them to issue, must have before it such evidence as will justify it in doing so. Such evidence we had before us, when we directed the attachment to issue; and, until the defendant can show that he is entitled to some special exemption or privilege, he will be treated as any other citizen. A precedent for the course now pursued, is to be found in 11 La. 599.

The right of the court to propound interrogatories to the defendant, is as unquestionable as the right to attach his person. The practice is almost universal, and is not deviated from, except in those cases where the court have other evidence before them upon which they can act. When presented, the court has a right to have them answered; and we do not believe the defendant is protected by the clause of the constitution he invokes. The interrogatories in this case were not propounded for the purpose of compelling the defendant to give evidence against himself; but to enable him, if he could, to exculpate himself from the alleged contempt. This he has refused to do, and thereby aggravated the first offence. 4 Blackstone, 287. 1 Dallas, 319. 3 Yeates' Penn. Rep. 438.

The second section of the act of 1823, (B. & C.'s Dig. 23,) says, that "nothing shall be construed, or taken as a contempt of court by an attorney, but what shall be said, done, or committed, directly in the presence or hearing of the court, during the sitting of the same." By art. 912 of the Code of Practice, a party, or his counsel, must "apply to the court for a new hearing in the cause, and for this purpose shall present a petition," &c. From this it is clear, that the petition must be presented when the court is in session; it cannot, according to the plain provision of the article, be done at any other time; and we have a right to presume, that the defendant complied with the law, and presented his petition during the sitting of the court; therefore, the con-

tempt was committed during the session. In the case of the *State v. Keene*, (11 La. 596,) it was settled, that the use of abusive and impertinent language in a petition for a re-hearing, was a sufficient ground for an attachment, and for punishing the party for a contempt. The decision given in that case has been universally approved of, as we believe, and we see no reason to doubt its correctness. An application for a re-hearing in this court, is similar to an application for a new trial in the inferior tribunals, and must necessarily pass under the notice and supervision of the court whilst in session. To facilitate business in this court, it has been allowed to parties to file their applications with the clerk without a formal motion; but this practice was founded on the supposition and confidence reposed in the members of the profession, that they would not insert in their petitions any matter impertinent to, or abusive of, the court, or any thing calculated to bring the administration of justice into contempt or disrepute. No party, or his counsel, has a right to have any paper or document filed without the knowledge and consent of the court; and it would be strange indeed, if it were permitted to counsel deliberately to write out and file among the records of the court, in the recess between its sittings, the most opprobrious calumnies and abuse of the highest tribunal in the State, without any responsibility, when if the same language had been used in the heat and excitement of an oral argument, it would instantly have consigned the speaker to the walls of a prison. Common sense, law, and justice, all forbid, that a party shall secretly place among the records of this court, with impunity, a document which the author of it would not have been permitted to read in public, and which, if he had attempted to read, would have brought upon him certain punishment. But, in this case, the defendant has not shown that the document in question was filed in the recess of the court; and we, therefore, have a right to presume, that it was filed according to law, and that he is responsible for it.

The defendant has further said; that as to the expressions used, and as to his motives, views, and objects, in applying them, the petition must speak for itself. No one can read the extracts from the printed pamphlet stated in the order directing the arrest of the defendant, after this statement, without being satisfied, that

it was his intention, so far as he was capable of doing so, to abuse and vituperate the judges of this court, and, as much as the power existed in him, to bring them and the administration of justice in this State, into disrepute. The purposes and objects which the defendant may have in view, in effecting this end at this time, we shall not enter into or discuss, but shall content ourselves with a vindication of the motives, acts, and authority of this court, in the case in question, and a refutation of as unjustifiable and malicious a libel as was ever published or written.

During the last month, after it was announced by the presiding judge of the court, that no causes, other than those then fixed for trial, would be argued or considered, the defendant applied to the judges of this court collectively and individually, and urged upon them the propriety of taking into consideration the case of *Mercier v. Canonge et al.*, upon written briefs, representing that it was a suit rather of a friendly character, and intended to settle a succession, about which difficulties existed, but which, if delayed, would cause serious injury to some of the parties. Under these circumstances, the court agreed that the cause might be submitted upon briefs to be filed, with an understanding that the case would be considered and decided, if time permitted. In consequence of the anxiety of the defendant, and our own desire to settle what was supposed to be a family difficulty, we did, at some personal inconvenience, and somewhat to the prejudice of other suitors, take the case into consideration, and give it as thorough attention as we could bestow on any case not argued, and pressed as the court was with business, near the end of a long term. Of six points raised for our decision, three were decided in favor of the clients of the defendant, and three against them; upon which three points the defendant, in behalf of his clients, has applied for a re-hearing, and in his petition for it, makes imputations upon, and insinuations relative to the judicial integrity of this court, which are unfounded in fact, and calumnious in the highest degree. These expressions are set forth in the order directing the attachment to issue, and need not be repeated.

As to the ire which the defendant says he designed to "vent," and the indignation he has expressed in consequence of our judg-

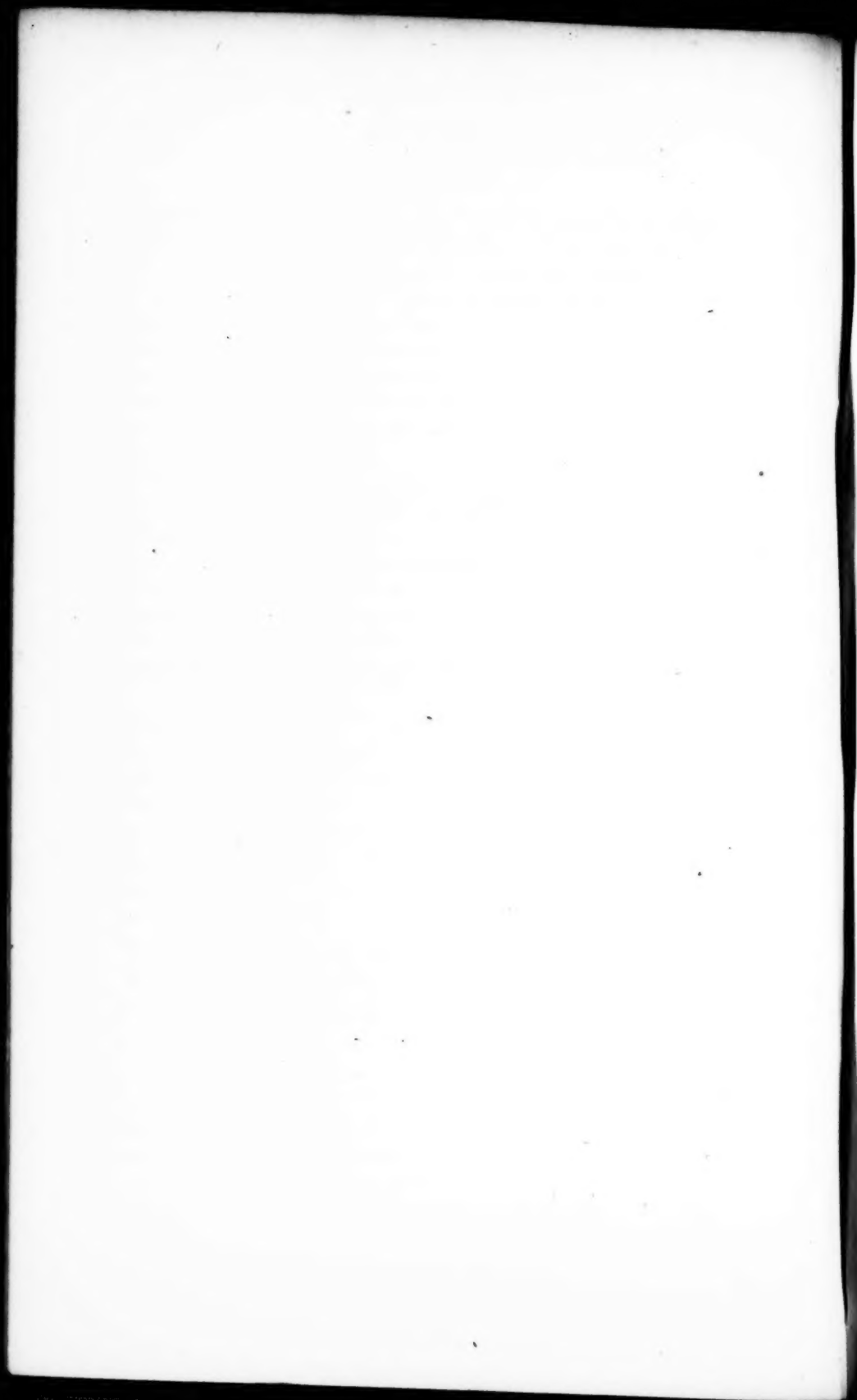
The State v. Soulé.

ment, we estimate it as lightly as we do the menace in the printed pamphlet, that it would not be "*safe*" for this court to refuse the re-hearing. No apprehension of any thing the defendant can say or do, will induce us to swerve from the duty we owe to the country and ourselves. We shall pursue such a course as appears to us just and proper, regardless of the approbation or disapprobation of interested parties, seeking only the approval of our own consciences, and the support of those for whose common benefit the administration of the laws has been entrusted to our hands.

Knowing as we do, that a government like ours, rests alone upon obedience to the law, and that its supremacy is the only bulwark and safeguard for every civil right; and believing that the defendant is as fully impressed with that opinion as we are, we regret very much, that one, occupying his position both at the bar and in society, should have set so pernicious an example to the younger members of the profession, and to his fellow citizens; and we hope that the example we shall make of him, will be a warning to them not to do likewise.

The sentence and judgment of the court is, that the defendant, Pierre Soulé, be imprisoned twenty-four hours in the jail of the parish of Orleans; that he pay a fine of one hundred dollars and the costs of this proceeding; and that he stand committed until the fine and costs are paid.

In the case of *The Louisiana State Bank v. Marie Noel Cordier*, from the Parish Court of New Orleans, the judgment below was affirmed on appeal in New Orleans, with damages, during the period embraced by this volume.



REPORTS OF CASES
ARGUED AND DETERMINED
BY THE
COURT OF ERRORS AND APPEALS
OF
LOUISIANA,
FROM JULY, 1843, TO FEBRUARY, 1846.

By an act of the Legislature of 6 April, 1843, it is declared :

"That there shall be established a Court of Errors and Appeals in criminal matters. (s. 1.)

"That this court shall have only appellate jurisdiction, with power to review questions of law ; which questions shall be presented by bills of exception taken to the opinions of the judge of the lower court, or by the assignment of errors apparent on the face of the record, taken and made in manner and form as now provided by law for appeals in civil cases. (s. 2.)

"That it shall be composed of three judges, who shall in all cases be selected from the district judges of the State, excepting the first judicial district, and appointed in the usual manner. (s. 3.)

"That the said court shall be holden in the city of New Orleans twice in every year, viz. on the first Monday of July, and on the first Monday of February, &c. (s. 4.)

"That said court shall have jurisdiction of all questions of law arising in the progress of any prosecution for violation of any penal law of the State, where the punishment may be death, or imprisonment at hard labor. (s. 5.)

"That said court shall, in cases within its jurisdiction, have all the incidental powers of appellate tribunals, of *mandamus*, *certiorari*, &c., to enforce its jurisdiction. (s. 5.)

"That two of said judges shall form a *quorum* of said court ; in which case, if there be a dissension of opinion, the judgment of the court below shall not be reversed." (s. 6.)

This court sat for the first time in July, 1843 ; and held its last session in February, 1846, its jurisdiction having been transferred, by the constitution of 1845, to the new Supreme Court. The Hon. THOMAS C. NICHOLLS, Hon. GEORGE ROGERS KING, and Hon. ISAAC JOHNSON, composed the court until February, 1846, at which term the Hon. WILLIAM D. BOYLE, sat in place of Judge Johnson, resigned.

The following pages contain reports of all the cases determined by this court.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF ERRORS AND APPEALS,
IN
NEW ORLEANS, JULY, 1843.

PRESENT:
HON. THOMAS C. NICHOLLS.
HON. GEORGE ROGERS KING.
HON. ISAAC JOHNSON.

THE STATE *v.* JAMES NOLAN.

The incompetency of some of the grand jurors by whom a bill of indictment has been found, is not cured by the omission to urge the objection on the first day of the term of the District Courts in the country parishes. The 5th sect. of the stat. of 6 March, 1840, applies only to the formalities to be observed in the summoning, formation, and drawing of the grand jury, not to the want of qualification of any member of the jury. But an objection founded on such want of qualification is inadmissible on a motion in arrest of judgment, when the party is confined to matters apparent on the record. Nor will a demurrer on the part of the State to a motion in arrest of judgment, made on the ground of such want of qualification, though amounting to an admission of the want of qualification, obviate the objection that the error complained of was not apparent on the face of the record.

An indictment which charges an offence to have been committed "at the parish of C———" is sufficient. The omission to designate a particular place within the parish, and the use of the word *at* for *in*, are immaterial. The offence is properly charged to have been committed within the *parish* instead of within a county.

In criminal proceedings no foreman is appointed to a jury; nor is it necessary that the verdict should be signed.

A judgment condemning a criminal to three years imprisonment at hard labor, and to pay the costs of the prosecution or to remain imprisoned one day longer, is not illegal in a case in which the three years and one day do not exceed the maximum of punishment allowed by law.

The State v. Nolan.

APPEAL from the District Court of Caddo, *Boyce, J.*

Preston, Attorney General, for the State.

Crain, Tuomey and Hiestand, for the appellant.

NICHOLS, J. The accused was convicted before the inferior court, of the crime of horse stealing, and has taken an appeal to this court, upon an exception to the opinion of the judge, *a quo*, on a motion in arrest of judgment, for reasons stated in the motion itself.

Judgment was sought to be arrested in the lower court, on the ground that four of the grand jurors by whom the bill of indictment was found, were not qualified, as the law requires, to act as jurors. This motion was met, on the part of the State, by a *demurrer*, which was sustained by the court, and the motion to arrest the judgment overruled.

It is contended, on the part of the State, that the incompetency of the jurors is cured, by the provisions of the fifth section of the act of the Legislature, entitled, "An act directing the mode of composing and drawing juries for the District Courts," approved March 6th, 1840.

This section declares; "That all and every objection which might or could be made on account of any defect or informality which may have occurred, either in the *formation, drawing, or summoning* of said juries, under the provisions of this act, or any other defect whatever in the *construction* of said juries, shall be made on the first day of the terms of the said District Courts, and not afterwards."

The provisions of the act of 1840, are not confined to the grand jury *alone*, but refer to the whole panel; to the traverse, as well as to the grand jury, to civil as well as criminal cases. Were such a construction as that urged on the part of the State, adopted by the court, it would abrogate entirely the right of challenge, would repeal, *in toto*, the various statutes passed by the Legislature upon the subject of juries, believed now to be in force, thereby annihilating, at a blow, all those safeguards established by the lawgiver, for the purpose of insuring a fair and impartial trial. Thus, a party litigant on the civil docket, having no apparent interest in analyzing the composition and constituent elements of a grand jury, would be frequently entrapped. Conscious that no criminal prosecution could be directed against him, it could scarcely be expected or required, that he should pry into a matter which evidently concerned him not, under the heavy penalty, in case of neglect, of being deprived of the right of submitting his case to a competent and disinterested jury of the country. Yet, if such be the true construction of the act, it could lead to no other result. In vain would he invoke the right of challenge to the individual

juror, be he father, brother, or even husband of his opponent. He will be told that he has suffered the time to elapse within which such objection should have been urged ; that the fatal *first* day of the term has passed, rendering thereby the jury collectively and individually, competent and legal. To this conclusion the court would be compelled, necessarily, to arrive, unless it confined the enactment *strictly* to the objections specified in the section, to the formalities required in the *formation, drawing* and *summoning* of a jury, which the court believes to be the true intent and meaning of the law. These specific objections are, to the *formation, drawing* and *summoning*, not to any supposed want of qualification on the part of any *particular member* of the jury ; and if any thing were wanting to strengthen this construction, it is abundantly furnished by the subsequent phraseology used in the section, to wit, "or any other defect whatever in the *construction* of said juries," adopting a term of art, evidently confined to the *erection* of the building, not to the *quality* of the materials. Besides, in many instances, particularly in the country, any other construction would operate as a denial of justice. Grand juries having little business before them, are frequently discharged on the first or second day of the term, at which time answers are not always required to be filed, and few issues are joined. A prayer for a jury, under these circumstances, might continue the whole civil docket.

It however by no means follows from this train of reasoning, that the objection can be successfully urged *at all stages, of the trial*, or in *every form of exception*. What might be good upon a motion for a new trial, might and would be inadmissible on a motion in arrest of judgment. On this *latter* motion, the party is confined to matters apparent on the record. He is not permitted to travel out of, nor beyond the record ; he cannot seek matter *aliunde*, to impeach the correctness of the proceedings.

A *demurrer*, on the part of the State, does not appear, to this court, to have been a proper answer to the motion, conveying, as it does, an admission that the jurors did not possess the qualifications necessary to make them good and lawful men. Still this circumstance cannot change the law, which refuses relief whenever the error complained of is not apparent on the record, upon which *alone*, the motion can be based. No *subsequent* occurrence can make that *good*, which was bad *ab initio*. The record contained, when the motion in arrest of judgment was made, no evidence whatever of any want of qualification in any member of the jury ; and, therefore, furnished *nothing* upon which the motion could operate.

Chitty, (Crim. Law,) observes ; "It is clear, that a defendant *before issued joined*, may plead the objection in avoidance ; but if he

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take no such objection *before his trial*, it seems doubtful how far he can afterwards take advantage, except it can be verified *by the records of the court* in which the indictment is depending, as in case of an outlawry of one of the indictors in the same court; in which case, any one, as *amicus curiæ*, may inform the court of the objection;” exacting, as a *sine qua non*, that the objection should be patent upon the record, and relaxing this strictness, (and not confining the party to the record of the case,) only in cases where the objection can be sustained by the record of the same court, though in a different case.

Three other points have been made by the counsel for the accused, as being apparent on the record, which it becomes the duty of the court to examine. First, it is averred that the indictment is bad, because there “is no such place as the parish of Caddo, it being the body of the county.”

The answer to this exception is found in the act of the Legislature, designating its limits, establishing its courts, and giving it a name, “the parish of Caddo.” The law organizing the courts ordains, that a district court shall be holden in each and every parish. The district courts are obliged, by the statute, to hold sessions in each parish, into which the former division of the State is merged. The substitution, therefore, of the word “parish” for “county,” was both proper and necessary. The point as urged in the argument before this court, assumes as fatal, the absence of the assignment of a particular place within the parish, at which the crime is charged to have been committed; as also the use of the word “at” instead of “in.”

Upon an examination of the forms of indictment in the English books, we find such to be the *formula* usually adopted: *exempli gratia*, at the parish of Westham, in the county of Essex, &c. 1 Chitty, 146. The first to designate the venue; the second to show jurisdiction in the court. Starkie’s Crim. Plead. 67, *et seq.* Both were requisite in England; and may, probably be so now, for reasons, however, which are inapplicable in this State. There the party accused was entitled to be tried by a jury of the vicinage or neighborhood. Here the prisoner has no such right, the jury being selected from the body of the parish for the trial of all cases cognizable by the court. The word “parish” was, therefore, properly substituted for “county,” necessarily required to be used in England. The necessity which required its use in England, not existing in Louisiana, it is difficult to find any reason why it should be adopted here. *Cessante ratione, cessat et ipsa lex.* Besides, it comes within the very letter of the act, approved 4th March, 1805, which evidently intended, in adopting the common law of England, to strip it of all those redundancies and useless formalities of which even

the English judges themselves complained, although compelled to regard such things as substance and not form. By the thirty-second section of this act it is provided, "that all the crimes, offences, and misdemeanors hereinbefore named, shall be taken, intended, and construed according to and in conformity with the common law of England, divested, however, of unnecessary prolixity; the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of the crimes, changing what ought to be changed, shall be, except as is by this act otherwise provided for, according to said common law."

Now, what change would more palpably strike us as proper, than that of dispensing with a form (though still followed in England, if such be the case,) which would here, and under our system of jurisprudence, be nugatory and vain.

"At the parish of Caddo," the court believes to be equivalent to *in* the parish of Caddo. The two expressions would convey the same idea to every man in the community; and, therefore, what every one would understand as meaning the same thing, cannot reasonably be supposed to be so vague and indeterminate as to have operated to the injury of the accused. Besides *non constat*, to this court, at least, that the crime charged was committed in the parish of Caddo. It may have been committed, for aught the court knows to the contrary, in the adjoining parish, on the boundary, or within one hundred yards of it, on which hypothesis the indictment would be clearly good. Vide Robinson's Crim. Law, p. 191, articles, 335, 336.

The second exception is; "That the verdict is bad, no foreman having been appointed through whom the jury acted, as appears by the record, and the verdict not having been signed."

In criminal proceedings the court never appoints a foreman. It is true, that the jury speak through one of their members as their organ of communication with the court, which member, in legal parlance, has been called a foreman; but he is no officer of the court, neither can he exercise authority, nor control the deliberations of his peers. He speaks for the whole jury, who would otherwise be compelled to answer *seriatim*, preventing thereby the unnecessary consumption of the time of the court. In England, the verdict is delivered *ore tenus*, recorded by the clerk as delivered, and read to the jury as recorded. They are asked if such be their verdict, and an affirmative answer closes their mission. The verdict is never signed. The practice in our State has not been uniform in this particular, some judges following the English forms, others requiring the verdict to be signed by the foreman. Either manner appears to this court to be legal.

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The third and last exception complains of the judgment of the inferior court as illegal and oppressive, in condemning the convict to three years imprisonment in the penitentiary at hard labor, and to pay the costs of the prosecution, or to remain in prison one day longer.

Had the additional imprisonment of one day transcended the maximum of punishment defined by the law, the question would have presented itself under a different aspect. By the act of 19th March, 1818, under which this conviction took place, the punishment is limited to five years; and it appears to this court, that the judgment is substantially a condemnation for three years and one day, according to the prisoner the privilege or faculty of release one day sooner, on payment of the costs.

The statutes referred to in argument, by which a prisoner may be discharged, either by a justice of the peace, or by act of insolvency, are inapplicable to this case, where the sentence is imprisonment and costs, and not fine and costs, as stated in the statutes.

Judgment affirmed.

THE STATE v. SEABORNE *alias* CALVIN MOORE.

The killing a slave, like that of a free person, may be either murder or manslaughter according to the circumstances of the case; and both offences are punishable by the laws of this State. The 16th section of the stat. 7 June, 1806, was enacted for the purpose of removing all doubt on this subject.

The acts of the Legislature, in 1806, were passed in both the English and French languages, both being texts; and they must be construed the one by the other—as parts of a whole, and not as distinct acts or expressions of the legislative will.

The second section of the stat. of 20 March, 1818, punishing the crime of manslaughter, applies to the offence when committed on a slave, as well as on a free person.

The provision of the first section of the stat. of 20 March, 1818, that on trials for murder, the jury may find the prisoner guilty of manslaughter, is not inconsistent with the 18th sect. of the 6th art. of the constitution.

An indictment commencing “State of Louisiana, Parish of, &c.” which recites that, “The grand jurors for the State of Louisiana, &c., acting in the name and by the authority of the State,” &c., is a sufficient compliance with sect. 6, of art. 4 of the constitution, requiring all prosecutions to be carried on in the name and by the authority of the State.

It is sufficient in an indictment, to charge that an offence was committed in a particular parish; no further designation of the place is necessary. An averment that the offence was committed *at* a parish is equivalent to *in* the parish.

Where on an indictment for murder the jury find the prisoner guilty of manslaughter, it is not necessary that the verdict should expressly negative the murder, nor declare whether the manslaughter was voluntary or involuntary, the law making no difference in the punishment of voluntary or involuntary manslaughter.

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In criminal proceedings it is not necessary that the verdict should be written upon the indictment or signed by the foreman of the jury. It is sufficient that a verdict be delivered orally, in open court, when it is recorded.

As every indictment for murder contains virtually an accusation of manslaughter, a verdict on such an indictment, finding the prisoner "guilty of manslaughter in manner and form as charged" is strictly correct.

In criminal proceedings no foreman is appointed to the jury.

The Code of Practice has no application to criminal prosecutions.

APPEAL from the District Court of Concordia, Willson, J.

Preston, Attorney General, for the State.

Finney, for the appellant. In criminal cases, by the common law, the accused may take advantage of mere formal objections. 1 Chitty's Crim. Law, 122. 1 Leach, 134. *Territory v. Nugent*, 1 Mart. 169. The indictment should have set forth more particularly the place where the crime was committed. 1 Chitty's Crim. Law, 197. 3 Bacon, 755, *verbo* Juries, E. The verdict should have shown whether the homicide was voluntary or involuntary, the latter being no crime at all. The court will not presume any thing against the prisoner. 4 Black. 192. The verdict is not responsive to the issue, in not negating the murder. 2 Hawk. 620. 7 Bacon's Abridg. *verbo* Verdict, H. 1 Chitty's Crim. Law, 638. Cro. Eliz. 296. Co. Lit. 282. The verdict is absurd in finding the prisoner guilty of manslaughter "in the manner and form charged in the indictment,"—such a verdict must mean guilty "with malice aforethought," as charged in the indictment. *State v. Upton*, 1 Devereux, 316. The verdict is unconstitutional. The stat. of 1818 (1 Moreau's Dig. 389) could not annul the provision of the constitution. The verdict was not signed by the foreman of the jury; nor does it appear that there was any foreman. 3 Robinson's Pract. 262. 1 Munf. Rep. 254. A clerk's certificate of a fact is no evidence. 1 Mart. N. S. 522. It does not sufficiently appear that it was the verdict of the jury at all. 1 Chitty's Crim. Law, 634-5. The judge, *a quo*, and the jury, overlooked the important distinction between an offence committed on the person of a free white, and on that of a slave. Slaves are expressly excepted from the general code defining and punishing crimes and misdemeanors. 1 Moreau's Dig. 373, s. 47. There is a particular code for the punishment of offences committed by or upon slaves, which must govern this case. 1 Moreau's Dig. 118, s. 16. The statute punishing the homicide of a slave speaks of the wilful killing—the French text using the word *malicieusement*; and this text should govern. The killing of a slave in the heat of blood, or involuntary manslaughter, is not punished; it has been overlooked by the legislator, and the court cannot supply the omission. *Territory v. Nugent*, 1 Mart. 169. The punishment inflicted by the judgment is greater than the law authorizes. 1 Moreau's Dig. p. 118, s. 16; p. 367, s. 22.

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Saunders and Frost, on the same side.

JOHNSON, J. The defendant, Calvin Moore, was indicted at the May term of the District Court for the parish of Concordia, for the murder of Hardy Ellis. At the same term he was tried, convicted by the jury of manslaughter, and sentenced by the court to seven years imprisonment at hard labor. From the judgment of the District Court he has appealed.

The principal questions presented for our consideration grow out of a bill of exceptions taken to the charge of the court, and to the refusal of the judge to give the following instructions to the jury, viz. :

"1st. If the jury find from the evidence in the case, that the deceased was a slave, they must find for the accused, unless they find that he killed the deceased deliberately, or with malice expressed or implied.

"2d. If the jury find from the evidence, that the deceased was a slave, and that the accused killed him in a sudden affray, without malice, express or implied, the law is for the defendant.

"3d. That if the deceased was a slave, they cannot find the accused guilty of manslaughter, but the case must be governed by the Black Code.

"4th. That where the words of a territorial law are different in the English and French versions, the provision of the constitution making the English version the only rule, does not apply, such laws having been passed previously to the adoption of the constitution.

"5th. That, by the constitution, a party charged with murder cannot be found guilty of manslaughter.

"6th. That, whether the prisoner considered the deceased a slave or not, if he was in fact a slave, the Black Code governs."

The court, on the contrary, charged the jury :

"That the condition of the deceased, whether slave or free, did not affect the character of the offence; that manslaughter was a crime which could be committed by a free white man on the body of a slave; that the English side of a territorial statute, in case of discrepancy or doubt, was to govern; and that, if the prisoner treated the deceased as free, he could not set up his slavery as a defence, even if it were a defence in law."

The position is taken in the charge asked for, and in the arguments presented to this court, that the wilful and malicious killing of a slave is the only crime created by our statutes, and that manslaughter, when a slave has been the subject of the homicide, is an offence unknown to our laws, and to the commission of which no punishment has been annexed. In support of this position, the defendant relies upon the statute of 1806,

which enacts, that "if any person whatsoever shall wilfully kill his slave, or the slave of another person, the said person being convicted thereof, shall be tried and condemned according to the laws of the territory," &c. Bull. & Curry's Dig., 61. It is contended, that this is the *only* statute which declares the killing of a slave to be a crime; that the word "*malicieusement*" is used in the French version, in lieu of "*wilfully*" in the English, which makes the crime murder; and that this version should control, as being most favorable to the accused.

At an early day, the Supreme Court of this State said; "That the acts of the Legislature, from 1806, inclusive, were passed in both languages; an original in each received the signature of the Speaker of the House of Representatives, of the President of the Council, and the approbation of the Governor; so that they are both *texts*; and the practice of the court has been to construe them, the one by the other. But we cannot consider the two acts otherwise than as parts of a whole, and not as distinct expressions of the Legislature—as two acts." 2 Mart. 177.

If the rule of construction here prescribed be adopted, as asked for by the defendant, we find that the English and French versions "are both texts, and to be construed the one by the other, not as two separate acts, but as parts of a whole."

We do not concur with the counsel, that the interpretation is *always* to be given to an act which is most favorable to the accused. If such a rule were *invariably* observed, the act now under consideration furnishes an instance of the consequences which would flow from it. For, had the accused been convicted of murder, the English version would have been most favorable to him, as, taken singly, it reduces the crime to manslaughter; whereas, when convicted of manslaughter he would ask, as he now does, that the French version should control, considering that version the most favorable; thus the statute might become nugatory and inoperative. It is manifestly intended to declare some description of homicide of slaves to be punishable; that intention may be gathered from the circumstances under which the act was made, and by comparing it with laws *in pari materia*. From these it appears, that slaves are regarded both as persons and property; and the intention of the lawgivers must have undoubtedly been, to discharge the obligations which humanity and sound policy imperatively imposed upon them, of giving the most ample protection, both to the person of the slave, and to the property of the citizen, from all such acts of violence as might result in death, when accompanied with malice, or mitigated by such circumstances as would reduce the crime to manslaughter. At the time that this act was passed, there existed upon our statute books, laws defining the crimes both of murder and man-

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slaughter, and providing for their punishment, in which no reference is made to slaves or persons of color. Slaves were considered as persons enjoying all the rights and privileges of citizens, of which they had not been deprived by express legislation, and as entitled to the protection of the laws. As such, they might then have been the subjects either of murder or manslaughter. The act now under consideration, appears to have been subsequently passed from abundant caution, for the express purpose of obviating the question which is now presented, and of removing any doubt which might have previously existed with regard to the homicide of a slave.

It has been contended, however, that no greater punishment can be imposed upon the accused, than that established by the territorial statute referred to in the act of 1806. This brings us to the inquiry, whether the statute of the 20th March, 1818, is of universal application, or limited in its operation to manslaughter committed upon free persons. The language of the act is general: "If any person shall hereafter commit manslaughter, and shall be thereof convicted," &c. B. & C.'s Dig. 246. We have seen that the crimes both of murder and manslaughter were known to the laws of the territory, and that the object of the act of 1806 was, to remove all doubt as to the mode of their prosecution and extent of their punishment, when committed upon slaves. While the law stood thus, the Legislature proceeded to extend the limits previously prescribed to the discretion of the judge in awarding the punishment for manslaughter, without excepting the crime when committed on a slave. We must suppose, that the statute was framed with reference to the then existing laws, which recognized no difference of color or condition, as far as related to the crime in regard to which they were legislating; and that the intention of the Legislature was, that it should apply generally to the offence, upon whomsoever committed.

An analogous question arose in the courts of Tennessee, where it underwent an elaborate investigation. By an act of that State, the wilful and malicious killing of a negro or mulatto slave, with malice aforethought, is made murder, and the offender punishable with death, without the benefit of clergy. The accused was indicted for the murder of a negro man slave, and found by the jury guilty of manslaughter. A motion was made in arrest of judgment, because the jury had found the defendant guilty of manslaughter, which crime, where the person slain was a slave, did not, in point of law, exist. Much learning and ability appear to have been brought to the investigation of the point. The learned judge from whose opinion we quote, says; "We cannot concur with the view the counsel has taken of this case, and

assent to the position, that the common law, or its principles, are not to have an influence in the decision of this case. It is true, as observed in the argument, that pure and proper slavery never subsisted in England, giving the master power of life and death over the slave, but a species of slavery or servitude existed there from the earliest times; the subjects of it were not styled slaves, but villeins, and their state and circumstances much resemble that of slaves at the present day." After showing the points of resemblance between the condition of villeins and slaves, which are striking, the judge proceeds; "By the common law, murder is where a person of sound mind and discretion, unlawfully killeth any reasonable creature, in being, under the king's peace, with malice aforethought, either expressed or implied. Manslaughter is the unlawful killing of another, without malice either expressed or implied. Both these definitions include the villein, and the negro or mulatto slave."

The judge proceeds to say; "That the judgment is the same, that would have been rendered against the accused, if the subject of the homicide had been a free man, instead of a negro slave. There is no law authorizing any distinction between the two cases. There was no distinction at common law between the judgments in homicide for killing a free man, and the killing a villein." *Law of Slavery*, 255, *et seq.* The court consequently held, that the crime was manslaughter. Much of the reasoning used in the able opinion from which we quote, applies with peculiar force to a case arising in this State, where "crimes, offences, and misdemeanors are to be taken, intended and construed according to, and in conformity with the common law of England." *Bul. & Cur. Digest*, 248.

Under the 18th sect. of the 6th art. of the constitution, which declares, that "in all criminal prosecutions, the accused has the right of being heard by himself or counsel, and of demanding the nature and cause of the accusation against him, it is contended, that the rule of the common law, that a party charged with murder might be convicted of manslaughter, has been changed, and that the act of 1818, authorizing such a verdict, is unconstitutional. At the time when the constitution was adopted, the common law rules of proceeding in criminal cases were in force here. Under our system at that day, as at the present, a person indicted for murder was informed by the instrument, a copy of which he received, of the "nature and cause of the accusation against him." He also understood, that by the existing laws, such an indictment contained virtually a charge of manslaughter against him, and that he would be called upon to answer both accusations. He knew, that if upon the trial, the killing was proved to have been committed with deliberate malice, the jury

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might convict him of murder; and, that if the homicide was unlawful, but without malice, they might convict him of manslaughter only. There appears to us nothing in this clause of the constitution, repugnant to the common law in force at the time of its adoption; and the object of the framers of that instrument was, not to abrogate the rules of criminal proceedings in this respect, but to secure to persons under criminal accusation, the rights which they then enjoyed.

The indictment is objected to as defective, because it does not "run in the name of the State of Louisiana," as required by the constitution, nor set forth, with sufficient accuracy, the place where the crime was committed. The instrument commences, "State of Louisiana, Parish of Concordia," and, after setting forth the style of the court, the time when and place where it was held, proceeds thus: "The Grand Jurors for the State of Louisiana, good and lawful men &c., acting in the name, and by the authority of the State of Louisiana," &c. using the precise language of the constitution, art. 4, § 6.

It has been considered essential at common law, not only to state in the indictment the county in which the offence was committed, but also the particular parish, ville, hamlet, or place within the county, to which a *venire* might be awarded; and, although the reason for this has long ceased in England, the jury being now summoned from the county at large, yet the practice has survived, of averring that the crime was committed at a certain parish, &c. 1 Chitty, Crim. Plead. 196. Our statute prescribes, that the forms of indictment, divested however of unnecessary prolixity, changing what ought to be changed, shall be, except as is otherwise provided for, according to the common law of England. Bul. & Cur. Dig. 248. By our laws, the jury is selected from the inhabitants at large of the parish. There is no smaller or other territorial subdivision from which a jury can be called, and there consequently can exist no reason, under our system, for designating any other place in which, or at which, a crime was committed. The district attorney has in our opinion, very properly changed what ought to have been changed, and divested the indictment of that which here would have been an unnecessary prolixity.

We consider the averment, that the crime was committed "at" the Parish of Concordia, to be a sufficient averment, that it was perpetrated within that parish.

The verdict is in the following words: "We, the jury, find the prisoner, Seaborne *alias* Calvin Moore, guilty of manslaughter, in manner and form as charged in the indictment." It is contended, that it should contain a declaration, that the manslaughter was either voluntary or involuntary, and that the murder

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should have been negatived. Whether the killing was voluntary or involuntary, if unlawful and without malice, it was equally manslaughter. The statute establishes no difference in the grades of the offence. The mode of trial, the rights of the accused, and the punishment of the offender, are the same in either event. Thus there appears to us no sound reason why the jury should ascertain the particular description of manslaughter, or announce it to the court.

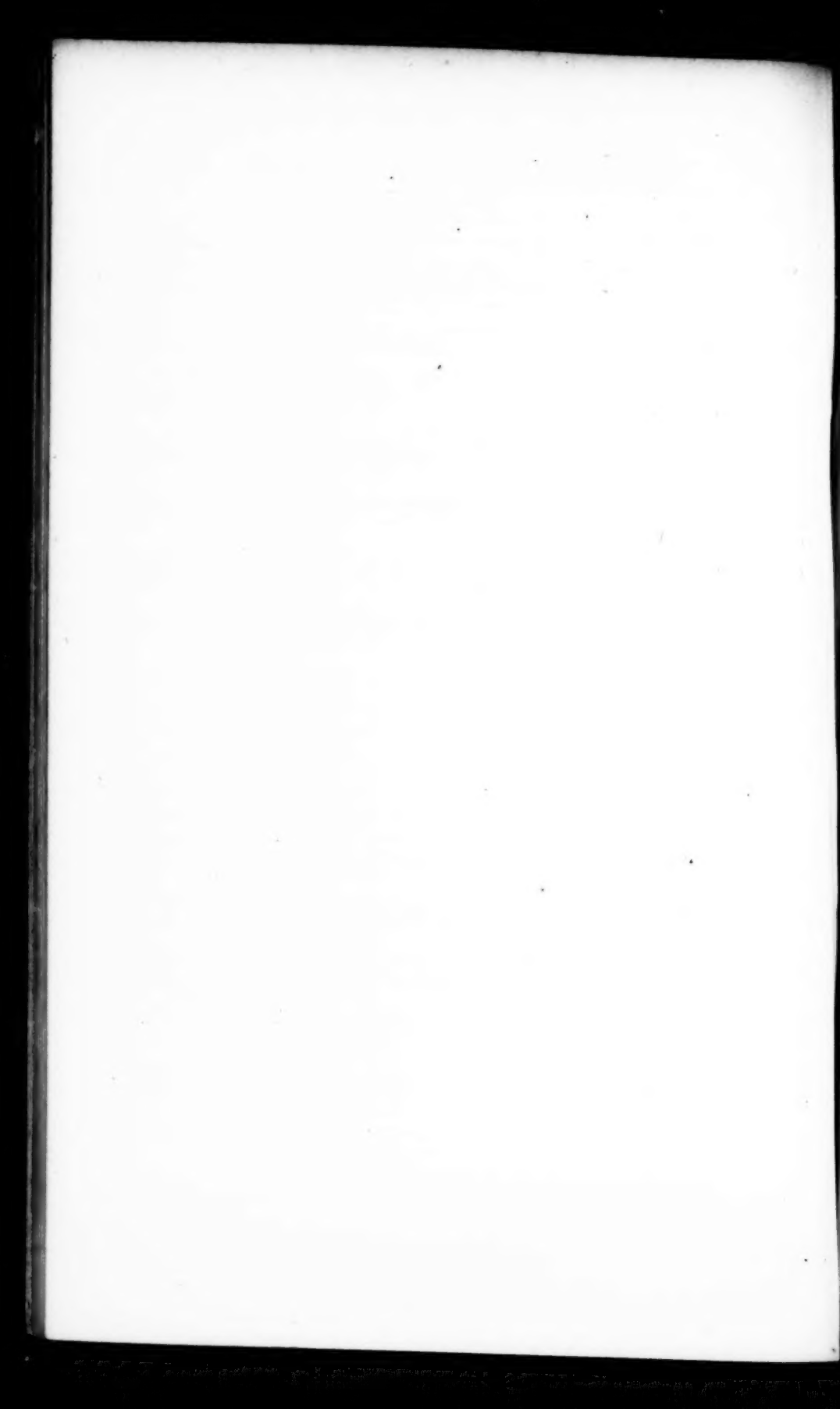
The earlier practice, at common law, upon indictments for murder, when the jury convicted the accused of manslaughter, was specifically to acquit of the murder and find guilty of manslaughter. This practice, however, has long since ceased to be considered indispensable in England, and was never necessary here. 1 Chitty, Crim. Plead. 644.

The verdict of the jury has not been signed by their foreman, nor does any foreman appear to have been appointed by the court. We do not consider it necessary, either that the verdict should be written upon the indictment, or signed by the foreman. It is sufficient to render it *ore tenus*, and that it be delivered in open court. When the jury agree, they are called upon to say simply, whether the prisoner be guilty or not guilty of the offence of which he stands indicted; to which through their foreman, they answer briefly, "guilty," or "not guilty," as the case may be. This verdict when received is recorded, much in the form used in the present instance, and then read to the jury. This is the only record of it necessary, and the only minute of it made. 1 Chitty, Crim. Plead. As every indictment for murder contains virtually an accusation of manslaughter, and the accused is called upon to answer both charges, the expression used in the verdict, that the prisoner was guilty "in manner and form as charged," is strictly correct.

In criminal practice, the court appoints no foreman. No such officer is known to the court or to the law. He is merely the person selected by the jury themselves, as their spokesman, to announce their verdict to the court. A different practice prevails in civil proceedings, depending, however, upon special legislative enactment. The rules of proceeding prescribed by the Code of Practice, have no application to criminal prosecutions.

Although the judge may have erred in his instructions to the jury, with regard to the rule of interpretation to be applied to the act of 1806, his charge is more favorable to the accused than it would have been, had it accorded with the view we have taken of the law. He might properly have instructed them, that slaves could become the subjects of either murder or manslaughter, independently of the act of 1806.

Judgment affirmed.



CASES
ARGUED AND DETERMINED
IN THE
COURT OF ERRORS AND APPEALS,
IN
NEW ORLEANS, FEBRUARY, 1844.

PRESENT:

HON. THOMAS C. NICHOLLS.
HON. GEORGE ROGERS KING.
HON. ISAAC JOHNSON.

THE STATE v. BILL.

* A slave may be convicted of the crime of rape, under the 7th sect. of the stat. of 7 June, 1806, on proof of his having attempted to have carnal intercourse with a white female child under ten years of age.

APPEAL from the Parish Court of Jefferson, *Smith, J.*
Preston, Attorney General, for the State.

T. A. Clarke, for the owners of the slave, appellants.

NICHOLLS, J. The accused was tried and convicted before the judge of the parish of Jefferson and six freeholders, on an accusation of an attempt to commit a rape upon the person of a child* aged about six years; from which conviction an appeal has been taken to this court, based on an exception to the judge's charge to the jury.

The judge charged the jury, that the term *rape*, in the Black Code, should be construed according to its common acceptation

* The child was white.

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among men ; and had his charge here stopped, it might not probably have been critically and technically correct ; but all possible objection was removed by his subsequent explanation of what constituted the crime, in his declaration "that if the evidence satisfied them that the prisoner had attempted to have carnal intercourse with the child, (though under ten years of age,) it was their duty to find the prisoner guilty." Thus explained, the charge was proper.

In the act of 23 January, 1805, it is provided, that every person who shall hereafter be duly convicted of any *manner of rape, &c.* This phraseology was evidently intended to cover, not only the crime of rape, as technically defined by the common law of England, (the unlawful carnal knowledge of a woman, by force and against her will,) but likewise the crime when committed upon the persons of children under ten years, created by the statute of the 18th Elizabeth, which latter crime, though strictly not a rape, was equally atrocious, and one to which we frequently find the best English writers have attached the name of *rape*. Thus, in 1 East, 44, he designates the crime committed on the person of a child of seven years old, *as a rape*. There being, therefore, but one kind of rape known to the common law ; and the lawmaker, using the words *any kind of rape*, must be presumed to have intended to include all that class of cases, which, in common parlance, were called rape.

But, whatever doubt might be entertained with regard to a *white* man, it appears to this court that there can be none where a slave is the party accused. In Bul. & Cur. Dig., 59, (Black Code,) it is enacted, that if any slave, free negro, mulatto, Indian or mustee, &c., shall commit or attempt to commit a rape upon the body of *any white woman or girl, &c.* The term *girl* is a generic term, and embraces female children of all ages, both over and under ten years. Such is the signification of the word *girl* given by the best lexicographers. Walker defines the word *girl*, *a young woman or child* ; Webster, *a female child or young woman* ; and finally, in the new and enlarged dictionary, compiled from South, Johnson, Murray, Cobbett, &c., *a female child* is the signification given to the word *girl*. In addition, we find in the French text, which is equally the law with the English, the words used are *viole une personne blanche*, (a white person,) making no distinction as to age. *Ubi lex non distinguit, non debemus distinguere.*

The judgment of the inferior court, must, therefore, be affirmed ; subject, however, to a modification, which originates in the impossibility of carrying the judgment into execution, on the day designated therein for the execution of the culprit.

Wherefore, it is ordered and decreed that the judgment of the

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court, *a qua*, be affirmed, except so far as it orders the execution to take place on the nineteenth instant; and the said court is hereby required to convene for the purpose of designating such time as may seem to it meet and proper, for said execution.

THE STATE v. JACQUES CHARLOT.

The term *felony* is unknown to the laws of this State.

New trials may be granted in criminal prosecutions.

By the statute of 6 April, 1843, creating the Court of Errors and Appeals, the court is empowered to grant relief against decisions of the inferior tribunals in criminal cases, upon questions confided to their legal discretion. But to enable the court to give such relief, a case must be stated and embodied in the bill of exceptions taken to the decisions below, in order that its correctness or incorrectness may be ascertained, unless the alleged error be apparent on the face of the record.

Where the record of appeal from a judgment in a criminal prosecution, furnishes no means of judging of the relevancy or importance of testimony, on account of the absence of which the prisoner prayed for a continuance which was refused below, the judgment of the lower court will not be interfered with.

In a prosecution for larceny, proof that the offence was committed on the precise day charged in the indictment is unnecessary.

In an indictment for larceny of a cow, a description of the animal by its kind, color and sex is sufficient. The sufficiency of such a description is not affected by any thing in the stat. of 20 March, 1827, relative to the branding of animals in certain parishes.

A new trial will not be granted in any criminal case on the ground of newly discovered evidence, where such evidence is irrelevant or unimportant, or the prisoner must have been aware of its existence before the trial, and was guilty of gross negligence in not procuring it.

APPEAL from the District Court of St. Landry, *Boyce, J.*

Preston, Attorney General, for the State.

Linton and Dupré, for the appellant.

NICHOLLS, J. Previously to entering on the merits of this case two preliminary questions have been raised, on the part of the State, which it is important to dispose of. It is contended on the part of the State, *first*, that it is the decided jurisprudence in England, whence we derive all our doctrines in criminal matters, not to allow new trials in cases of felony, and that the only remedy is by an application to the clemency of the crown; and, *secondly*, that it is equally well settled law, that a Court of Errors can, in no case, correct or control the decisions of the inferior courts upon questions which the law has confided to their legal discretion.

The term *felony*, although defined and well understood in England, is unknown to the laws of Louisiana. We have no

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such grade of offence. In fact, it would be repugnant to the genius and feelings of our people. So in still a *greater* degree would the remedy *there* resorted to for the purpose of protecting the accused from the blasting effects of an erroneous judgment, compelling him to carry to his grave the burning brand of shame and degradation, indebted to the mercy of the executive for the poor privilege of mingling with his fellow citizens, a convicted though pardoned felon, an object of scorn, a leper in a healthy community, despised and shunned by all; owing his liberty, perhaps his life, to the mercy of his government, when he had a right to claim it from her justice. Such would be the condition of the man whose application for justice through the means of a new trial, to which he was entitled, should be overruled in consequence of want of power in the court to grant relief. A people, proud of enjoying the prerogatives of freemen, could not, for an instant, brook such perversion of criminal justice. The granting new trials in *all* cases, is coeval, in Louisiana, with the government; and the proper exercise of this power is one of the safeguards of the people.

The second question, as to the power of this court to grant relief against the decision of an inferior court in regard to the proper or improper exercise of its discretionary powers, is elucidated, on the part of the State, by various decisions of the Supreme Court of the United States, among which is particularly prominent the late case of *Zacharie v. Franklin and wife*, reported in 12 Peters, 163. All that is decided in that case is, that a Court of Errors is incompetent to grant relief, from the refusal of the court below to grant a new trial. These various decisions, it is believed, are inapplicable to this court, which is not a Court of Errors *only*. The second section of the act entitled, "An act to establish a Court of Errors and Appeals in criminal matters, and for other purposes," thus defines its powers: "This court shall only have appellate jurisdiction, with power to review questions of law; which questions shall be presented by bills of exceptions taken to the opinions of the judge of the lower court, or by the assignment of errors, apparent on the face of the record, taken and made in manner and form, as now provided by law for appeals in civil cases." Questions of law are so frequently dependent upon the testimony, and so mingled with the facts, that it would, in many instances, be difficult to disconnect them. What would be a correct exercise of the legal discretion of the court, upon *one* set of facts, would, on a different hypothesis, where the mass of testimony was of a contrary and different complexion, constitute such a perversion of its legal discretion, as imperiously to require the intervention of this court. Hence the mode adopted in the State

of New York, requiring a case to be made, appears to this court a salutary and wise rule. 7 Wend. 331. Otherwise, in many instances, from the baldness of the bill of exceptions, this court might not be sufficiently enlightened to ascertain with certainty whether the judge had wisely exercised his discretion or not; and it will scarcely be denied, that as much injury may be inflicted upon the accused, by an improper exercise of this discretionary power, as by the erroneous decision of any point of law which may arise during the trial. The discretion confided to the judge is not of that wild, fanciful kind which he can exercise as he pleases. It is a *sound, legal* discretion, which he must exercise in such manner as not to deprive the party accused of any right or privilege guaranteed to him by the law. But to enable this court to extend relief, it is evident that a case must be made and embodied in the bill of exceptions, unless apparent upon the face of the record, by which the merits of the decision of the inferior court may be tested. Without this, however erroneous may have been the judgment of the lower court, this court, not having the means of pronouncing *scienter* in the premises, would be obliged to refuse relief.

Having disposed of these introductory questions, the court will proceed to the examination of the affidavit which was filed for a continuance; being the second application for a continuance on account of absent testimony. The affidavit details the nature of the testimony which was expected to be obtained. According to it, this testimony would establish two facts; *first*, that the witnesses were in the habit of visiting at the house of the prisoner and eating at his table; and that on no occasion did they find beef on his table, nor perceive any evidence that a beef or cow had been killed. Now, whether this testimony was relevant or irrelevant, this court is furnished with no means of ascertaining. The indictment charges the prisoner with *stealing*, not with killing the cow of Hebert Doucet; and in the absence of the *indicia*, which might have been afforded by a synopsis of the testimony upon this point, this court cannot say that the testimony was important. As is required in the State of New York, a case should have been made; and *then* the intervention of this court might have been properly invoked.

The second statement in the affidavit is equally untenable, *viz.* : that the absent witnesses could prove that two of the principal witnesses for the prosecution were not absent from their house, on the day charged in the indictment. The answer to this allegation is, *non constat* but they might still have seen the larceny committed; and moreover, the proof of the *precise* day named in the indictment, is not necessary. This affidavit contains a further statement of an expectation of destroying the credibility

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of two of the witnesses sworn upon the trial. The court is satisfied with the reasons assigned by the district judge for disregarding it, and thinks that the party was properly ruled to trial.

The last bill of exceptions is founded on the alleged defective description of the stolen property. The indictment charges the accused with having stolen one cow of a brown and white color; one cow of a red and brown color; one cow of a brown, red and white color, &c., the property of Hebert Doucet. This description is in strict conformity with the English *formulae* of indictments. Designating the animal by its kind, color and sex, is considered by the court as amply sufficient. The act of the Legislature, approved March 20th, 1827, entitled "An Act to create a central office of brands of animals, in the parishes of St. Landry, St. Mary, Lafourche and St. Martin," to which the attention of the lower court was called, does not in the slightest manner affect or impugn the correctness of the opinion delivered by the District Court; it merely enacts, that a certified copy of the registry shall be received in evidence, unless attacked for forgery. It does not profess to alter or amend in any way, the law as it then stood; and it will scarcely be contended, that because the owner did not think proper to brand his horses or cows, no larceny could be committed by taking and carrying them away, and converting them to the use of the person so taking them.

A motion for a new trial on account of the discovery of new testimony, was unsuccessfully urged on the court below, and was, as this court believes, properly overruled. This newly discovered testimony was expected to be obtained from the evidence of Louis Bordelon; and consisted in the establishment of the fact that, either in the month of May or June, 1843, the prisoner sold a cow to said witness, who branded her with his own brand, after it had been counter branded by the prisoner. What bearing such testimony might have had upon the trial, it is impossible for this court to say. So far as we are enabled to judge, with the lights before us, it appears irrelevant and unimportant. Besides, if the statement be true, the prisoner, (having made the sale,) must have been aware of the fact long before the trial, and was guilty of gross negligence and *laches*, in not having procured the attendance of the witness before entering on the trial. He had already obtained one continuance on account of the absence of this very witness, and was consequently advised of the importance of his testimony. The application was evidently for delay, and was properly overruled.

Judgment affirmed.

THE STATE v. DAVID CLARK.

In a prosecution for larceny, proof that the offence was committed on the day charged in the indictment, is not necessary. It is sufficient if it be shown to have been committed at any time within a year previous to the finding of the indictment.

Evidence discovered since the trial of one found guilty of larceny, which neither disproves nor has any tendency to disprove the main fact found by the jury, that the accused was guilty of larceny within twelve months previous to the finding of the indictment, cannot entitle the prisoner to a new trial.

APPEAL from the District Court of St. Landry, *Boyce, J.*
Preston, Attorney General, for the State.
Linton and Dupré, for the appellant.

JOHNSON, J. On the 30th day of November, 1842, the accused was indicted by the grand jury of St. Landry, in the fifth judicial district, Judge Boyce presiding, for the larceny of a heifer, alleged to have been committed in said parish, on or about the 10th day of September, 1842; the heifer was alleged to have been the property of one Charles Soileau. At that term of the court the case was continued for testimony on the affidavit of the accused; and, at the succeeding term, it was continued by the State; but at the November term, 1843, it appears from the record, that the trial was brought on without objection or opposition, and resulted in a verdict of guilty. A new trial was sought on the ground of newly discovered evidence, supported by affidavit. The motion was overruled by the judge, from whose decision in this respect, as well as to his charge to the jury, this appeal has been taken. As first in order on the trial, we will first dispose of the charge complained of.

It appears that the counsel of the defendant requested the judge to charge the jury, "that the State was bound to prove that the offence charged in the indictment was committed on the day stated therein, or within the prescription required by law;" whereas, and instead, the judge said to the jury; "It was not necessary the proof should show, that the crime charged in the indictment was committed on the precise day stated. That it sufficed, if the proof showed the crime to have been committed on any day before the finding of the bill of indictment which the jury were trying, provided it was within a year previous to the finding of said bill." In this charge we cannot perceive the slightest error or misdirection. Time was not of the essence, nor an essential ingredient in the constitution of the offence prosecuted, and was only important in regard to prescription, which the judge expounded correctly.

The next and only remaining question is, whether the judge

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erred in overruling the motion for a new trial. The affidavit is unusually prolix, but it is necessary to give it at length, in order that our views of it may be understood. It is as follows; "The defendant deposeth and says, that since the trial and conviction in the above case, he has discovered new and important witnesses, whose testimony is material and important in his defence, and which he could not have summoned to appear and testify on the trial of his cause at the present term of your honorable court, they residing out of the parish of St. Landry and county of Opelousas. That the names of said witnesses are — Phelps, and François Hebert, residing in the county of Rapides, and Eugenie or Ginuy Hook, residing in the county of Opelousas, in a distant part of the parish of St. Landry. That by the first of said witnesses he expects to prove, that he is a deputy surveyor of the United States, who has traversed the 31st degree of north latitude, which is the boundary line between the counties of Opelousas and Rapides, and that that line includes your affiant's place of residence in said county of Rapides. That your affiant and his neighbors have paid taxes, and have uniformly voted in the said county of Rapides, and that said district of country has never been considered as an integral portion of the county of Opelousas, nor themselves as inhabitants of said county. That they do not perform any of the parochial duties, nor are they considered liable to perform them on the part of the people and inhabitants of the parish of St. Landry. That he expects and believes further to prove by said Phelps, that he resides several miles within the boundary of the county of Rapides. By the second witness he expects to prove, that he resides on the plantation adjoining him; that he did so reside at the time the offence is alleged to have been committed; and for a year before, being a man of family; and that said Hebert's plantation is situated in the county of Rapides. He subjoins to this affidavit said Hebert's certificate from the register and receiver of the land office at Opelousas, from which it will appear, that his premises are situated in the said county of Rapides; and he desires it may be considered as part of this affidavit. That said Hebert has for many years resided on said premises, and that your affiant has for the last two years and a half, resided adjoining him on the north-west, as will appear from a diagram annexed to said certificate of François and Joseph Hebert. That he is informed and expects to prove by the third witness, Eugenie or Ginny Hook, that on or about the time alleged in the indictment, as that when the animal was stolen and destroyed, William Carpenter and Eli Clark did kill a heifer, (whether the animal alleged as prosecutor's, this affiant knows not,) but without the knowledge, consent, or participation of this affiant. That at the time aforesaid, he was confined to

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his house by an injury in his foot, and unable to go out of it; that if the said animal was destroyed he knew nothing about it, had no hand, act, nor part therein; and that said Miss Hook will state these facts fully on her examination."

The principal object of the testimony of the two first named witnesses is, to prove that the residence of the accused was in the parish of Rapides. Let it be granted that they could fully prove that fact, it would not take from the accused the capacity of perpetrating a crime in the parish of St. Landry, nor show that the offence of which he has there been tried and convicted, was not committed in that parish. Let it also be granted that Ginny Hook would prove, that on or about the time laid in the indictment, William Carpenter and Eli Clark did kill a heifer without the knowledge of the defendant, and that on or about the time laid in the indictment he was confined to his house by an injury in his foot, and unable to go out of it; and that "if the said animal was destroyed, he knew nothing of it,"—still, this only proves negative and immaterial circumstances, and neither disproves nor has any direct tendency to disprove the existence of the main fact found by the jury, that the accused, at some time within twelve months anterior to the finding of the indictment, committed larceny of a heifer, of the goods and chattels of one Charles Soileau, in the parish of St. Landry. It is not sufficient to warrant the granting of a new trial, that the newly discovered evidence might have the effect of throwing a shade of doubt over some of the incidental circumstances of the trial. It should appear to be of so decided a character, that, if admitted, it would give an acquitting complexion to the case.

Judgment affirmed.

THE STATE v. GEORGE.

The Court of Errors and Appeals has jurisdiction of questions arising out of criminal prosecutions under the provisions of the statutes of 7 June, 1806, known as the Black Code. Stat. 6 April, 1843, s. 5.

Slaves charged with capital offences are entitled to be tried by an impartial jury. They have no right to challenge a juror peremptorily; but their right to challenge for cause is the same as that of free persons.

To disqualify a juror on the ground of his having formed an opinion as to the guilt of the accused, his opinion must have been deliberately formed. Light impressions, which may be fairly supposed to yield to the testimony that may be offered, and which leave the mind open to a fair consideration of it, are no sufficient objection to a juror; but those strong and deep impressions which will close the

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mind against the testimony that may be offered in opposition to them, and which will combat and resist its force, constitute a sufficient objection.

Where the extent of the punishment of an offence is left to the discretion of the jury, the fact that one offered as a juror has made up his mind as to the measure of punishment which should be awarded to the accused in case of conviction, is a sufficient cause to reject him.

The statutes of 7 June, 1806, (s. 1,) and of 19 February, 1825, (s. 1,) which prescribe the mode of trial of slaves charged with capital offences, requiring that the judge and freeholders shall be of the parish in which the offence was committed, the venue constitutes, in such prosecutions, as in other ordinary criminal prosecutions, a substantive charge, and it must be specially proved.

Where one charged with a criminal offence is described as a slave, and, with the assistance of his owner, submits, without objection, to be tried as such, it is such an admission of his condition, as will prevent him from requiring the judge to charge the jury that the fact of his being a slave should be proved to warrant a verdict of guilty. *Per Curiam*: It was such an admission of his condition as he could not contradict at that stage of the prosecution. He should have made the issue before going to trial on the merits, or have availed himself of it after verdict.

Where on the trial of a slave charged with a capital offence, the parish judge remained with the jury, after they had retired to deliberate on their verdict, in order to read to them the testimony, which he had reduced to writing so illegibly that they were unable to decipher it, but afterwards withdrew, and subsequently returned, at their request, and wrote out their verdict, these acts, though irregular, will not vitiate a verdict, where it does not appear that the judge availed himself of his presence among the jury to participate in their proceedings. *Per Curiam*: The jury should have been brought into court, and the testimony read to them there; and, when prepared to render their verdict, if unable to write it themselves, it should have been written in open court, by the clerk or judge, under their direction.

New trials may be granted in criminal prosecutions; and where a new trial has been improperly refused by the court of the first instance, it will be ordered by the Court of Errors and Appeals.

APPEAL from the Parish Court of Tensas, *Montgomery, J.*

Preston; Attorney General, for the State.

Farrar and Shaw, for the appellant.

KING, J. The accused, who is the slave of Lewis Covington, has been charged with wilfully and maliciously striking Collinsworth, the overseer of his owner, causing a contusion and shedding of blood. Upon this accusation he was tried by the parish judge and six freeholders of the parish of Tensas, where the crime is alleged to have been committed, convicted and sentenced to suffer death. Covington, the owner of the slave, has appealed from this judgment, asking that it be reversed, and the case remanded for a new trial, for the several reasons stated in bills of exceptions taken to the rulings of the judge, during the progress of the prosecution.

Before proceeding, however, to the consideration of the several grounds of alleged error, it becomes necessary to dispose of the doubt expressed, whether this court would take jurisdiction of questions arising upon prosecutions under the enactments of the Black Code. This doubt is removed by reference to the

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5th section of the act creating this tribunal, which provides, "that said court shall have jurisdiction of all questions of law arising in the progress of *any prosecution* for the violation of *any penal law of the State, where the punishment may be death or imprisonment at hard labor.*" Acts of 1843, p. 60. No distinction of persons is made in the act.

The first ground of complaint is, that the court erred in refusing to permit the defendant to challenge a juror, "who had formed his opinion as to the guilt of the accused, upon vague rumor;" and had stated further, "that his mind was made up as to the punishment which should be inflicted upon the prisoner, in the event of conviction."

The several acts prescribing the manner of convoking and forming juries for the trial of slaves charged with the commission of crimes which may subject them to capital punishment, undoubtedly refuse to this class of persons the right to peremptory challenges. They are nevertheless entitled to a trial by an impartial jury; and, in order to attain that end, their right of challenging for cause in many respects, cannot differ materially, if at all, from those of free persons. In the case under consideration, the objections to the juror must be tested by the rules which prevail in ordinary prosecutions.

Under our system, which permits no change of venue, it frequently becomes difficult, when a crime, from its enormity, or from circumstances accompanying its commission, grows into notoriety, to find men within the parish in which it was committed, who have not formed some vague opinion, favorable or unfavorable to the accused. However desirable it may be to procure jurors whose minds are prepared to receive their impressions alone from the testimony submitted to them, yet the experience of almost every term of a district court held in the country parishes, teaches, that this is often impracticable. The ends of justice require, that such offenders should be brought to punishment, and they will not be permitted to shield themselves from the consequences of their crimes by perpetrating acts of such heinousness as to excite universal inquiry, which inquiry leads to the formation of an opinion. Yet such would be the result, if jurors were rejected merely because, from vague and floating rumors, they had formed some indefinite opinion, which, upon inquiry, often proves to be merely hypothetical. To disqualify the juror, his opinion should have been *deliberately formed*, as is commonly the case, where he has heard the evidence before the examining justice or upon a former trial of the same cause, or has heard the statements of the principal witnesses. These become proper subjects of inquiry when the juror is presented to the prisoner. Much must necessarily be left to the judgment of the tri-

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ors or judge, as the case may be, in ascertaining whether the mind of the juror be open to receive impressions from the evidence, or whether his opinions have been so deliberately formed as to resist those impressions. On the trial of Aaron Burr, when the same question arose, Chief Justice Marshall said ; " Were it possible to obtain a jury, without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury ; but this is perhaps impossible, and therefore will not be required. The opinion which has been avowed by the court, is, that light impressions which may be fairly supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror ; but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him. Those who try the impartiality of a juror, ought to test him by this rule." Burr's Trial, p. 416.

With the rule here established as our guide, we are not prepared to say, that the judge erred in overruling the first objection to the juror, as it does not appear from the bill of exceptions that he was interrogated further, or made any other statement from which we might infer that he had formed a deliberate opinion, in relation to the guilt or innocence of the accused.

The second objection to the juror was well taken. His mind was " made up," as to the measure of punishment which should be awarded to the accused in the event of his conviction. The act of 1814, annexes the penalty of death to the crime with which the defendant is charged ; and a conviction under it, previously to the passage of the act of 1843, placed the punishment of the prisoner beyond the discretion or control of the judge or jury. A sentence fixed and ascertained must necessarily have followed. An opinion however fully formed, under such circumstances, with regard to the punishment which should ensue upon conviction, would have formed no valid objection to a juror ; and would only have been considered as his opinion of the law, applicable to a supposed state of facts. An important change, however, has been made in the duties which devolve upon the jury, by the statute of 1843, § 7, which enacts ; " That in all cases where capital punishment or imprisonment at hard labor for life is inflicted for any crime committed by a slave, the jury trying the same shall, in its discretion, pronounce sentence of death, imprisonment at hard labor for life, or for a shorter time in prison, or in irons in the service of his master, or order that corporal punishment be inflicted." Thus it now rests with the jury in such cases, not only to deter-

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mine the guilt of the accused, but also, within prescribed limits, the punishment which shall be inflicted upon his conviction. The juror's opinion was fixed and settled upon an important branch of the case which he was called to decide, and his mind consequently closed against the various considerations which might induce a jury to mitigate their sentence. In Burr's case, jurors were rejected, who believed that he was prosecuting the treasonable design with which he was charged, at the time of the acts laid in the indictment, although they had formed no opinion as to whether he had committed those acts. Burr's Trial, 417. The case now under consideration is much stronger; and we think, the judge erred in permitting the juror to be sworn.

The second ground of alleged error is, that the judge refused to instruct the jury, that they ought to acquit the prisoner, if the prosecution failed in making proof of the venue as charged.

The acts of 1806 and 1825, prescribing the mode and form of trial of slaves for capital offences, of which the act of 1843 is amendatory, require that the judge and freeholders shall be of the parish where the offence was committed. Bul. & Curry, pp. 57, 68. A tribunal differently composed would have been without jurisdiction. A parish judge or freeholders of any other parish, would not have answered the requirements of these statutes. The venue under these acts, constitutes, as it does in ordinary criminal proceedings, a substantive charge, which must be specially proved. 1 Chitty, 177, 556.

The judge should have instructed the jury that, in order to convict the accused, they ought to be satisfied from the testimony, that the offence had been committed in the parish of Tensas, as charged, and that they were the judges of the sufficiency of the evidence adduced to establish that fact. When an acquittal occurs upon grounds of this kind, the fact should be stated in the verdict, as it would not bar a prosecution for the same offence in the proper parish.

The third bill of exceptions was taken to the refusal of the judge to charge the jury, that the slavery of the accused ought to be proved, to warrant a verdict of guilty.

The defendant having appeared, and with the aid of his owner submitted to a trial as a slave without objection, is such an admission of his condition as he could not contradict at that stage of the prosecution. He should have made the issue before going to trial upon the merits, or have availed himself of his plea after verdict.

It appears, that after the jury had retired to deliberate upon their verdict, the parish judge remained with them in order to read to them the testimony, which he had reduced to writing so illegally, that they were unable to decipher it; after accomplishing

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which he withdrew, but subsequently returned, at their request, and wrote out their verdict. These acts were certainly irregular, although they might not vitiate a verdict rendered upon a trial in other respects regular, as it does not appear that the judge availed himself of his presence among the jury to participate in the proceedings. The jury should have been brought into court, and the testimony there read to them; and when prepared to render their verdict, if unable to write it themselves, it should have been done in open court, by the clerk or judge, under their direction.

An application was made to the court below for a second trial, based upon the several grounds which have already been considered. The question has been made, whether it be competent to the courts of this State to grant second trials upon convictions for murder, or for offences termed at common law felonies; and whether this court will interfere with those of original jurisdiction, in the exercise of such a power, which, if it exist, it is contended, is entirely discretionary. It has been held in the case of the *The State v. Charlot*, ante, 529, that our courts of criminal jurisdiction possess this power in all cases; and that, when improperly exercised, their acts will be reviewed by this court.

It is, therefore, ordered and decreed, that the judgment of the court below, be annulled and reversed; that a new trial be granted to the slave George; and that this case be remanded, to be proceeded in according to law.

THE STATE v. NORMAN SHELDON.

On an appeal by one found guilty of uttering a counterfeit bank-bill, taken from a judgment refusing a new trial, asked for on the ground that there was no legal evidence to show that the prisoner had any knowledge of the character of the bank-bill upon which the indictment was framed, the verdict of the jury will be considered conclusive as to the sufficiency of the proof. *Per Curiam*: This court cannot inquire into the correctness of the verdict on this point. The *scienter* was a matter of fact for the jury to find.

As a general principle, an indictment for forgery or counterfeiting, or uttering forged or counterfeited bills, must contain an exact copy or recital of the bill, where the prosecuting attorney attempts to set it out by its tenor; but where, from the difficulty of ascertaining a particular word, the prosecuting attorney attempted to make a *fac-simile* of it, the indictment will be good.

In an indictment for uttering a forged bank-bill, though the prosecuting officer attempt to set it out by its tenor, he is not bound to set forth words written in the margin of the bill; and where, in attempting to do so, the indictment recites that the bill contained the words *cinquante piastres* on the right hand of the vignette, while it actually contained the words *cinquante gourdes*, the statement will be regarded as surplusage, and the variation as immaterial. *Per Curiam*: In in-

dictments for forgery it is unnecessary to set forth the ornamental parts of the bill, as the devices, mottoes, &c.

APPEAL from the Criminal Court of the First District, *Cannonge, J.*

Dufour, District Attorney, for the State.

Sever, for the appellant.

JOHNSON, J. On the 14th of December, 1843, the defendant was tried and convicted in the Criminal Court of the First District, for uttering a false, forged and counterfeit bank-bill, which purported to have been issued by the Louisiana State Bank. Soon after, his counsel filed grounds for a new trial, and subsequently moved in arrest of judgment; both motions failed, and this appeal has been brought.

We omit the consideration of the first specification for a new trial, as, if good, it presents matter that properly belongs to a motion in arrest of judgment, and which, indeed, forms the *gravamen* of the motion, awaiting, in order, our attention. As to the second specification for a new trial, "that the verdict of the jury is contrary to evidence, inasmuch as the proof on behalf of the State failed to establish the *scienter*, there being no legal evidence to show that the defendant had any knowledge of the character of the bank-bill upon which the indictment was framed, and, therefore, the material allegations of the guilty knowledge of the defendant not having been legally made out by the proof," they may be easily and summarily disposed of. There is no power in this court, to inquire into the correctness of the verdict on this point. The *scienter* was a matter of fact for the jury to investigate and find; and the verdict of guilty, rendered in the case, is an affirmation, not to be doubted here, that the proof was amply sufficient. Had the question been, whether the evil intent must be proved by evidence extrinsic of the utterance of the bill, we might, on an assignment of errors, have looked into the judge's exposition. But as no bill of exceptions presents this or any kindred point, we have no hesitation in saying, that the refusal of a new trial was right. We therefore pass to the assignment of errors in arrest of judgment. The first is; "That the indictment, upon which the conviction of the defendant was had, sets forth that said defendant uttered, &c., on a certain day, &c., a counterfeit bank-bill of the denomination, &c., purporting to be a bank-bill issued by the Louisiana State Bank, &c., in the words following, to wit; 'Pay to, &c., bearer on demand,' &c., under which indictment the public prosecutor was, by law, bound to prove on the trial of said cause, the said instrument or bank-bill to be *in hæc verba*, as laid in said indictment, or to prove by said instrument that it contained the words *verbatim*, as in said indictment set forth. Whereas the said instrument, or alleged

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counterfeit bank-bill, contains the words 'pay to, &c., bearer or demand,' instead of 'on demand,' which variation or substitution of the word *on* for the word *or* in the instrument, vitiates the indictment, and renders it bad in law, and the verdict of conviction of said defendant rendered by the jury, contrary to law and erroneous; wherefore, no judgment can legally or ought to be pronounced on the said verdict; but, on the contrary, the proceedings in the premises and said judgment ought to be arrested, and said indictment quashed."

We fully acknowledge, as a general principle, the rule which, in indictments for forgery or counterfeiting, requires an exact copy or recital of the bill or note, when the prosecuting officer assumes to set it out by its tenor, or, as in the case at bar, "as follows, to wit;" and we approve of the reasons which the authors on criminal law give for such scrupulous nicety, that the court may see that the bill or note averred to be forged or counterfeit, is one of those instruments, the false making of which the law considers forgery or counterfeiting, as the case may be; and also that the defendant may know the general nature of the crime of which he has been accused. Chitty's Crim. Law. But while we admit the law, with its reasons, to be as stated, we have not the least desire to strengthen the rule by an unlimited application of it. The original indictment, with the counterfeit bill annexed, has been brought up; and we have given to them, in the parts alleged to be discrepant, a critical examination. From this examination it is manifest, that the district attorney, foreseeing the objection which would be opposed in the event of a conviction, to pronouncing the sentence of the law, attempted, in the indictment, to make a *fac-simile* of the word in the counterfeit bill which he found difficult to recognize as either an *or* or an *on*; and we think his execution of that attempt is marked by quite as much precision and nicety, as, in the novelty of the dilemma in which he was placed, was necessary. This is clearly not a case of the negligent omission of a word, nor of the substitution of a word different from that which the character of the indictment demanded. But we think it a case in which the alternative of attempting a *fac-simile* of the questionable word, was legitimately adopted by the prosecuting officer; and that to deny this right in such a case, would be to declare the artifices of the forger and the counterfeiter paramount to all law. With this view, then, of the first ground taken in arrest of judgment, we pass to the second specification, which is as follows, to wit; "That said indictment further sets forth, that said instrument contains the words '*cinquante piastres*,' on the right hand of the vignette, across the face thereof, whereas, and instead thereof, said instrument or bill contains in said place '*cinquante gourdes*,' which

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variation or substitution of said words '*cinquante piastres*' in the indictment, for the words '*cinquante gourdes*' in the said instrument is fatal, and renders said indictment bad in law, and said verdict contrary to law." In the objection thus taken, the facts are truly stated as the record presents them. But in an indictment for forgery it is unnecessary to set forth the ornamental parts of a bill, as the devices, mottoes, &c. 2 Binney's Rep. 332. The prosecuting officer, in the case under review, was not bound by the rule of an exact recital, to notice the words "*cinquante piastres*" in the margin of the bill; and if, in an attempt to give any of the ornamental parts of a bill, he fail, it will be regarded as surplusage, which cannot vitiate.

Judgment affirmed.

THE STATE v. CHARLES LENNON.

It is not necessary that all the counts of an indictment should be written upon the same sheet of paper, nor, when on separate sheets, that they should be attached together.

Where, on a motion for a new trial, in a criminal prosecution on the ground of the discovery of an important witness since the trial, the name of the witness is not disclosed in the affidavit, the motion must be overruled.

APPEAL from the Criminal Court of the First District, *Canonge, J.*

Dufour, District Attorney, for the State.

A. Canonge, for the appellant.

KING, J. The defendant, Charles Lennon, having been convicted of inveigling slaves, and sentenced to imprisonment at hard labor for six years, has appealed from the judgment of the Criminal Court, and seeks to have it reversed, and himself finally discharged, on the ground, that the instrument purporting to be an indictment against him, consists of two counts, written upon two separate and detached pieces of paper, one count being upon each. That the first contains the usual caption, but is not signed by the attorney general or district attorney, nor endorsed with the finding of the grand jury. That the second, though signed by the officer, and endorsed with the finding of the grand jury, is without caption or venue. It is contended, that for these reasons, neither count in itself constitutes a perfect indictment; that there is no certainty, that the two form one common act, nor that more than one of them was ever submitted to the consideration of the grand jury; and hence, that the instrument is defective.

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We are aware of no rule of pleading which requires, that all the counts of an indictment shall be written upon the same sheet or piece of paper; nor, that when prepared upon separate leaves, they shall be attached together. It happens not unfrequently, either from the nature of the offence, as in cases of libel or perjury, that a single count will fill more than a sheet of paper; or that the district attorney, entertaining doubt as to the manner of laying the charge so as to meet the testimony, or as to the construction which may be given to a statute, multiplies his counts for the exigency, so as to exceed the limits of a single sheet. Although in such cases the record might be presented in a shape less liable to be questioned, if the distinct parts were attached together, yet this would not prevent the evils which it is apprehended may arise from countenancing a different practice, nor close the door against the interpolation of counts which had never been submitted to the jury. If a corrupt officer were disposed to perpetrate so foul a fraud, the frail ligatures which usually bind together the parts of a record, would oppose but a feeble obstacle to the accomplishment of his purpose. Were an act of such turpitude committed, as to substitute or add counts to an indictment which had previously been acted upon by the grand jury, the accused could undoubtedly claim protection and relief. But an act of such immorality will not be presumed. And even upon so grave a charge being formally preferred, all the legal presumptions would be in favor of the honesty and integrity of the sworn officer, who had been selected for the trust, with reference to his known character for probity. He will be presumed to have discharged his duties with fidelity, until the contrary shall be made to appear.

But, in the present instance, no shadow of imputation is cast upon the district attorney; the defendant relying upon the facts which have been stated, as constituting a defect which vitiates the indictment, even in the absence of fraud.

Independently of the absence of any such rule as that contended for by the defendant, of its inefficacy, even if established, to prevent the apprehended evils which might grow out of a different practice, and of the legal presumptions, which are all opposed to the position taken by the defendant, we think, that the indictment contains some internal evidence, that both the counts were presented to the grand jury. The second leaf, upon which the finding is endorsed, is *without caption*, and commences with the words, "*second count.*" Both these circumstances must have given notice to the jury, that there was a first count, without which the indictment would have been incomplete. It is difficult to believe, that acting under the instructions and immediate supervision of both the court and the district attorney, they were

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so wholly ignorant of their duties as to have considered one count only.

A second alleged error is, that the court erred in refusing a new trial applied for upon the ground of newly discovered evidence. The name of the witness discovered after the trial, has not been disclosed in the application; nor, if it had been, could we undertake to decide upon the materiality of his evidence, without possessing more fully the facts connected with the transaction, than can be gathered from the motion and affidavit. The conclusive reasoning, however, of the judge, contained in his elaborate written opinion overruling the application, in which he adverts, from memory, to some of the evidence adduced upon the trial, convinces us, that he has wisely used the discretion confided to him.

Judgment affirmed.

THE STATE v. JEREMIAH MCCOY and others.

It is unnecessary in an indictment for murder to state the length, breadth, or depth of the wounds. The term *mortal* is indispensable in describing the bruise or wound; but when so described, an adequate cause of death is assigned, which will be supported by evidence of any deadly wound or bruise. It has never been required to prove either a wound or bruise as laid.

Where an indictment for murder alleges the infliction of "several mortal bruises and wounds in and upon the right side of the head, also in and upon the stomach, back and sides" of the deceased, it is a sufficient description both of the character and locality of the wounds.

The Legislature in providing by the sec. 33 of the stat. of 4 May, 1805, that "all the crimes, offences, and misdemeanors hereinbefore named, shall be taken, intended and construed according to and in conformity with the law of England; and the forms of indictment (divested however of unnecessary prolixity,) the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of the said crimes, offences and misdemeanors, changing what ought to be changed, shall be, except as is by this act otherwise provided for, according to the said common law," must be understood as having adopted that system of law as it existed in 1805, modified, explained and perfected by statutory enactments, so far as those enactments are not inconsistent with the peculiar character and genius of our institutions.

Where the mortal stroke by which a murder was effected, was given in one parish and the death occurred in another parish in this State, the crime must be prosecuted in the parish in which the death occurred. But where the mortal stroke was given in this State, but the death occurred in another State, the crime may be inquired of in the parish where the stroke was inflicted.

APPEAL from the District Court of Pointe Coupée, *Deblieux, J.*

Preston, Attorney General, for the State.

Boyle and Ratliff, for the appellants.

KING, J. The defendants, Jeremiah McCoy, Warren Coving-

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ton, and John Pough, were indicted, with Peter Cade, who does not appear to have been tried, for the murder of James Leonard Hornsby, in the parish of Pointe Coupée. The indictment alleges the mortal strokes to have been given in the parish of Pointe Coupée, in the State of Louisiana, on the 26th day of February, 1843, and the consequent death to have occurred in Adams county, in the State of Mississippi, on the 15th day of March following.

The defendants were tried in the parish of Pointe Coupée, convicted, and sentenced by the court, each to a fine of \$100, and to suffer imprisonment, at hard labor, for the term of one year. From this judgment they have appealed, asking that it be reversed, and that they be finally discharged from the prosecution, for the following alleged errors, apparent on the face of the record, viz :

"1st. The indictment is vague and indefinite in not stating any distinct mortal wounds to have been given, on any distinct portion of the body of the deceased; nor is any wound, mortal or otherwise, described with the necessary legal averments of length, depth," and breadth.

"2d. From the language of the indictment, alleging that the divers wounds and bruises, and mortal wounds were inflicted in the parish of Pointe Coupée, and that the death of James Leonard Hornsby took place in Adams county, in the State of Mississippi, it is apparent that the court, *a qua*, had no jurisdiction of the case against the accused, and could proceed to pass no judgment on the verdict of the jury."

These will be considered in their order.

It was formerly considered necessary, when the indictment alleged the death to have arisen from a wound which penetrated the skin, to describe its length, depth and breadth, except when it passed through the body, or a limb was cut off, in order to show an adequate cause of death. It was otherwise, when the death was averred to have proceeded from a bruise, and it was never required to prove either the wound or bruise as laid. It is now settled, that it is not necessary, in an indictment for murder, to state the length, breadth or depth of the wounds. The term *mortal* is indispensable in describing the bruise or wound, and when so described, an adequate cause of death has been assigned, which will be supported by evidence of any deadly wound or bruise. Archbold Crim. Pl. 385. 6 Am. Com. Law, 20.

The indictment, in the present case, alleges "several mortal bruises and wounds in and upon the right side of the head, also in and upon the stomach, back and sides," which is a sufficiently distinct description both of their character and locality, and conforms with the most approved precedents. Archbold, 406.

The solution of the second question presented, depends upon the interpretation to be given to the act of 1805, which in-

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roduced the common law in all criminal matters. This statute enacts; "That all the crimes, offences and misdemeanors therein named, (of which murder is one,) shall be taken, intended and construed according to and in conformity with the common law of England; and the forms of indictment, (divested, however, of unnecessary prolixity,) the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of the said crimes, offences and misdemeanors, changing what ought to be changed, shall be, except as is by this act otherwise provided for, according to the said common law."

At common law, murder, (a technical term which we have adopted, of known and settled meaning,) consists of the stroke and the consequent death. The concurrence of both being necessary for the consummation of the crime, when they occurred in different counties, the offence was incomplete in either. 1 East, 261. Hence doubts were entertained in relation to the proper venue in such cases. Both Hale and Hawkins say, that it was considered doubtful by some, whether the crime could be prosecuted in either county, but that the more common opinion was, that it could be inquired of in the county where the stroke was given. 1 Hale, 426. 1 Hawkins, 31, § 13.

To remove this doubt, and prevent a failure of justice, the act of 2 and 3 Edw. 6, was passed, which established the venue in such cases, in the county where the death took place. 1 East, 361.

We concur with the counsel in believing that the Legislature, in adopting the common law rules of proceeding, method of trial, &c., adopted the system as it existed in 1805, modified, explained and perfected by statutory enactments, so far as those enactments are not found to be inconsistent with the peculiar character and genius of our government and institutions. It will not be contended that those principles and rules of the common law, which had been abrogated and had ceased to exist in England, previously to 1805, were introduced by our statute. On the other hand, the system would have been incomplete and inefficient for the purposes contemplated by the Legislature, if they had not adopted the substitutes established by Parliament, for the rules of the common law which had been abolished. If this interpretation be incorrect, the Legislature have been guilty of the absurdity of enacting laws for the protection of life and property, without furnishing the means of bringing offenders to justice. We must presume, that it was intended to give effect to those laws, and to provide means for their enforcement, adequate to the ends which were in view.

With this construction of our act it may be considered, that by the statute of 2 and 3 Edw. 6, which is amendatory of the com-

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mon law, it is as fully and definitively settled in this State, as though such a provision had been made by special legislative enactment, that the venue in such cases, is in the parish where the death occurred.

It is then urged, that the venue being thus established, the indictment in the parish where the stroke was given, was erroneous. The answer is, that the cases are not analogous. The death has occurred not in different parishes of the same State, but in a different State of the Union, as separate and distinct from Louisiana, for all the purposes of internal police and the punishment of violations of its penal laws, as Great Britain is from France; and we find that such cases are not unprovided for by the system which we have borrowed.

At common law, it was doubtful whether the killing of one who died in England, of a blow received in foreign parts, and *vice versa*, could have been inquired of. Here again Parliament interposed, and put the question to rest, by passing the statute of 2d Geo. 2, which provides that, "when the stroke has been given in England and the death occurs out of England, or the reverse, that the killing may be inquired of in that part of England where either the *death or stroke* shall happen respectively." 1 East, P. C. 366.

The same reasons which have been urged for adopting the statute of Edw. 6, as part of our law in relation to venue, apply with equal force to the statute of Geo. 2. Both were passed for the purpose of explaining the common law, or of providing rules for the prosecution of criminals, in lieu of those which had grown into disuse, or which had been forgotten or become doubtful, or which experience had taught to be inconvenient or ineffectual. Under this statute the accused were properly indicted in the parish of Pointe Coupée.

An application was made to the District Court for a new trial, upon the ground that the verdict was contrary to the law and the evidence; and further, that the judge erred in charging the jury, "that John Pough and Warren Covington, who were proved to have been hired by Peter Cade to cut wood for him, and lived and were domiciliated in his house, could not be considered as his servants, nor in a capacity which brought it within the provisions of the common law, so as to defend the person or property of their employer."

No exception was taken to the charge of the judge, at the time it was given to the jury. Nor does it appear from the record, that instructions were asked upon this point; nor, in a shape which would authorize us to review it, that such a charge as that stated in the motion, was delivered.

There can be no doubt that the relation of master and servant

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may exist in this State, as at common law, with all the reciprocal obligations which grow out of that relation. It does not arise, however, from every contract by which an artificer and mechanic, or daily laborer, is temporarily employed to execute a specific piece of work, or to perform a specific service. The question is not presented in a form which renders it necessary, for the decision of the present case, to pursue inquiry upon this subject further.

Judgment affirmed.

THE STATE v. JAMES D. MIX.

The 5th sect. of the stat. of 7 February, 1829, which declares, that "whoever shall, with a dangerous weapon, or with intent to kill, inflict a wound less than mayhem, upon another, shall, on conviction, be imprisoned," &c., was intended to provide punishment for two distinct offences; that of assaulting with a dangerous weapon, and that of assaulting with intent to kill. The language is free from ambiguity, and cannot be affected by the French translation.

Anterior to the constitution, the laws of the territory were passed and promulgated in both the English and French languages; and the act in one language was entitled to as much respect as in the other; but that instrument having provided, by the 15th sect. of the 6th art., that "all laws that may be passed by the Legislature, shall be promulgated and preserved in the language in which the constitution of the United States is written," in the construction of statutes passed since its adoption, the language of the English text, when unambiguous, cannot be controlled by the French translation.

An indictment which charges a prisoner with "having unlawfully and feloniously, with a certain dangerous weapon, commonly called a life-protector, assaulted," &c., contains a sufficient description of the weapon, with which the assault was alleged to have been committed, using the very words of the statute of 7 Feb. 1829, s. 5. The use of the word *feloniously*, cannot vitiate the indictment. It may be rejected as surplusage.

APPEAL from the Criminal Court of the First District, *Cannonge, J.*

Preston, Attorney General, for the State.

Grymes, for the appellant.

NICHOLLS, J. The appellant stands convicted before the Criminal Court of New Orleans, upon the first count of an indictment charging him with two separate and distinct offences. The prosecution is based on a statute approved the 7th February, 1829, § 4. 1 Bul. & Cur. Digest, 270.

The first count in the indictment charges the accused, with having unlawfully and feloniously committed an assault, with a certain dangerous weapon commonly called a life-protector, upon one George C. Bröwer; the second, with having unlawfully com-

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mitted an assault upon George C. Brower, with intent to kill him, the said Brower, contrary to the form of the statute, &c. Upon this indictment, the jury returned the following verdict, viz; "Guilty as charged on the first count. Not guilty on the second count. Recommended to the clemency of the court."

An unsuccessful attempt was made in the lower court to arrest the judgment, upon four several grounds, as stated in the motion. First, "that by the finding of the jury, upon the first count of the indictment, which charges an assault, with a dangerous weapon, the defendant is guilty of no crime or offence according to the laws of Louisiana." Upon the solution of this question, (whether any such offence is recognized by the law,) will principally depend the fate of this appeal. The words of the statute above referred to are, "that whosoever shall, with a dangerous weapon, *or* with intent to kill, make an assault upon another person," &c. Confining ourselves to the statute, there can be little difficulty in putting a proper construction upon the words used. In fact, they admit of but one interpretation; they contain no ambiguity, either latent or patent. They clearly indicate *two* offences; first, an assault with a dangerous weapon; secondly, an assault with intent to kill. The court has no authority to reject or disregard the disjunctive word *or*, which the law-maker has thought proper to insert in the section. On the contrary, the court is bound to believe, that it was thus inserted, to convey the true intent and meaning of the Legislature. To reject or disregard it, would be taking upon ourselves the right of legislation, instead of confining ourselves to our legitimate function of *expounding*, and not that of *making* the law. The apparent harshness of the statute, as thus understood, offers to the court no justification in refusing to enforce the will of the Legislature, when clearly, plainly, and unequivocally expressed. The attention of the court has been called, by the counsel of the accused, to the French translation of the section under which this prosecution has been carried on. This translation, in language as free from ambiguity or doubt as the original, conveys a meaning totally different from the English, constituting but a single offence. The words used are as follows; "*Quiconque, armé d'une arme dangereuse, ET avec intention de tuer,*" &c., manifestly coupling the *intention to kill*, with the use of a dangerous weapon, *both* of which form a necessary ingredient of the crime.

It is urged on the court, that in cases of variance or discrepancy between the English text and the French translation, both should be referred to, and the legislative will be ascertained and declared, from an inspection of the two. Whether resort can be had to the French translation, where the law itself contains ambiguities or palpable contradictions, or is otherwise so lamely

worded as to render it difficult or impossible to comprehend its intent or meaning, presents a question, which the court is not called on, in this case, to decide. This section is devoid of *all* ambiguity or doubt. No two men can differ about its meaning. Anterior to the adoption of the constitution, the laws of the territory were passed and promulgated in the two languages; and our civil tribunals have repeatedly and invariably decided, that the one was as much entitled to respect as the other. These decisions contain a proper exposition of the law, as it *then* existed. The constitution, however, which is the supreme law, appears to have, formally, abrogated and abolished, what was, no doubt, *up to that time*, the settled law upon the subject. In the 15th section of the 6th article of the constitution, it is enacted, that "*All laws that may be passed by the Legislature, and the public records of this State, and the judicial and legislative written proceedings shall be promulgated, preserved and conducted, in the language in which the constitution of the United States is written.*"

The language here used is as clear and unambiguous as that found in the section of the act of 1829, on which we have just been commenting. If *all* the laws passed by the Legislature are to be *promulgated, preserved and conducted* (the words used in the section) in the language in which the constitution of the United States is written, and that language is English, it is difficult to imagine how an act which has *not* been thus promulgated, preserved or conducted, can be considered as possessing the stringent force, power and effect, which is necessary to constitute a law. It would be a *petitio principii* to say, that it *has* been promulgated, conducted and preserved in the English language, because, in that case there would be no necessity of resorting to the French translation. Neither is it in point of fact critically true, as the English law is *not* the law contained in the French translation.

The second ground taken in arrest of judgment is, "that the weapon described in the first count of the indictment, as a certain dangerous weapon, called a life-protector, is not adequately described and set forth."

The accused is charged in this count of the indictment, with having unlawfully and feloniously, with a certain dangerous weapon, (commonly called a life-protector,) assaulted one George C. Brower, transferring the *identical words* used by the law-maker, into this count of the indictment. The weapon, with which the assault is alleged to have been made, is described in the words of the statute, which the court is of opinion contains a proper and adequate description. In the act to which this is a supplement, the words *deadly* weapon are used; but it pleased the

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Legislature to substitute *dangerous*, for deadly weapon—a substitution no doubt intended to subserve a wise and legitimate object. The third ground is not brought before this court, in such a shape as will enable it to decide upon its merits; and the fourth and last is embraced in the first, upon which the court has already expressed its opinion.

The use of the term *feloniously*, it is contended, vitiates the indictment and all proceedings under it. The court thinks differently; and that the offence was well described without it. It may be considered as descriptive of the state of mind under which the act was perpetrated, or may be rejected as surplusage. *Utile per inutile non vitiatur.* 1 Chitt. 243. 2 East, 1029.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF ERRORS AND APPEALS,
IN
NEW ORLEANS, JULY, 1844.

PRESENT:
HON. THOMAS C. NICHOLLS.
HON. GEORGE ROGERS KING.
HON. ISAAC JOHNSON.

THE STATE *v.* ALBERT MAJOR.

Where the record of appeal in a criminal case contains no bill of exceptions, and there is no assignment of errors apparent on the face of the record, the case cannot be examined.

APPEAL from the Criminal Court of the First District,
Canonge, J.

Dufour, District Attorney, for the State.

David, for the appellant.

JOHNSON, J. The defendant, convicted in the Criminal Court of the First District of an attempt to commit a rape, has appealed to this court; but the record contains no assignment of errors, nor bill of exceptions to the rulings of the judge at the trial, and therefore a case has not been produced for our investigation. Accompanying the record is a loose sheet of paper, on which is inscribed what purports to be an original draft of a bill of exceptions to the opinion of the judge refusing a continuance, as also to his opinion excluding proof of the immoral character of two of the witnesses for the prosecution; but this paper is unauthenticated by the signature of the judge, and consequently is not in form to authorize us to inquire into its contents. As the matter stands

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then we must presume either that the judge's attention was not attracted to the paper in question, or, if it was, that he had sufficient legal reasons for withholding his signature; especially as the defendant has not sought relief by *mandamus*.

Judgment affirmed.

THE STATE v. LEONARD COLLINS HORNSBY.

To entitle the prisoner to a new trial in a criminal prosecution, on the ground of evidence having been discovered since the trial, the newly discovered evidence must be such as would probably produce a different verdict.

The omission, in an indictment for murder, of one or more letters in a word, which does not change the word into another of a different signification, will not vitiate the indictment; nor will it be fatal under the 15th sect. of the 6th art. of the constitution, which requires all judicial proceedings to be conducted in the language of the constitution, that such omission changes the word to a French term of the same meaning as that intended to be used, as where the indictment charges that the mortal blow caused "an *extravasion* (for *extravasation*) of blood, &c."

The omission, in an indictment for murder, of one or more letters in a word, where the whole word might be rejected as surplusage, is immaterial.

It is unnecessary in an indictment for murder to state the length, breadth, or depth of the wound. The term mortal is indispensable in describing the wound or bruise, but when so described and adequate cause of death is assigned, which will be supported by evidence of any deadly wound or bruise, it has never been required to prove either a wound or bruise as laid.

In capital cases a jury should not be permitted to separate, after they have been sworn, whether the prisoner consent or not. In cases not capital, courts may, in their discretion, permit the jury to separate, before they have received the charge of the court, but not after the charge has been given. In cases not capital, misconduct on the part of the jury, where they have been permitted to separate, will cause their verdict to be set aside; in capital cases, where they have separated, misconduct and abuse will always be presumed, and a new trial ordered.

Sect. 18. art. 6 of the constitution, having provided that, "in all criminal prosecutions the accused shall have the right of meeting the witnesses face to face and of having compulsory process for obtaining witnesses in his favor," the failure of the Legislature to invest the courts of original criminal jurisdiction with power to coerce the attendance of witnesses residing within the State beyond the limits of their respective territorial jurisdictions, cannot deprive the accused of his right, under the constitution, of having his witnesses heard, whether found within or beyond such limits; and as he is entitled to a speedy trial, (Const. art. 6, s. 18,) and as the right of being confronted with the witnesses against him is a personal privilege which the accused may waive, he may require the testimony of witnesses in his favor, residing within the State but beyond the jurisdiction of the court, to be taken under commission.

APPEAL from the Criminal Court of the First District, *Can-
onge, J.*

Preston, Attorney General, for the State. The indictment is

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not affected by mis-spelling. 2 Taunt. 401. 4 Comyn's Dig. 664, note. Hawkins P. C. 233. 1 Chitty, 139, 141, 142, 167, 196, 197. Jacob's Law Dict. (Tomlin's ed.) *verbo*, Indictment, No. III. 3 Black. Comm. 409, 410. Strange, 889. As to the sufficiency of the description of the wound, see 6 Com. Law Cases, p. 21. 7 Ibid. 101. 3 Chitty, 736. Leach, 569. 1 Russell & M. C. C. 5. 1 Russ. & Ry. 345, 358. 12 Petersdorff's Abridg. 725. *State v. McCoy and others*, ante, 545. Archbold's Evid. 385. The separation of a jury is not a ground for a motion in arrest of judgment, and a new trial was not moved for on that account. In England in early times, juries in criminal cases were kept together on bread and water; but this was only after the evidence was closed, the jury charged, and the case committed to them. See 4 Black. 354, 360, and note. This strictness has been relaxed in modern times. See the case of *Fries*, 3 Dallas, 515. 2 Sumner, 81, 82, 83. *State of Ohio v. Dougherty*, West. Law Journal, No. 6, p. 271. *Wilson v. Abrahams*, 1 Hill, 207. 12 Pickering, 519. 2 Wendell, 353. 3 Johns. 255. *Smith v. Thompson*, 1 Cowen, 221. 2 Hale's P. C. 193, 296.

Collens, for the appellant, as to the questions arising out of the motion for a new trial, cited 4 Black. 119, 192, 199, 201. 1 Russell, 604. East, 273. 1 Chitty, 611, 612. 2 Russell, 210. 1 Wheeler, 28. On the motion in arrest of judgment, he cited Const. art. 6, s. 18. Hawkins, 329, ch. 25, ss. 87, 88. 3 Chitty, 734, 735. 1 East, 343. 2 Hawk. ch. 23, s. 80; ch. 25, s. 57. Haywood's N. C. Rep. 140. Archbold, ed. 1824, p. 212; new ed. p. 317. 1 Chitty, 628. 6 Durn. & East, 530. Roscoe, 177, 178. 7 State Trials, 419. 13 Mass. 218. 5 Cowen, 283. Graham on New Trials, 91. McLeod's Trial, p. 16.

Preaux and *Soulé*, on the same side.

NICHOLLS, J. An appeal has been taken from the judgment of the Criminal Court of New Orleans, pronounced upon the verdict of the jury, who found the accused guilty of manslaughter. A motion for a new trial, and also a motion in arrest of judgment, were both made in the inferior court, by the prisoner, and overruled. The correctness of the opinion of the court, *a qua*, upon these two motions, forms the subject of this appeal. A new trial was urged, upon two grounds: 1st. Because the verdict was contrary to law and evidence—2d. On account of the discovery of new testimony since the trial. The judgment was sought to be arrested, on the following grounds: "1st. That the indictment is not wholly in the English language, as required by the laws and constitution of the State, and said indictment is wholly unmeaning, void and illegal." 2d. "That there is no intelligible or sufficient description of the means of death, or any mortal

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wound or blow. 3d. That the length and breadth of the wound alleged to have been mortal is not set forth in the indictment, as required by law, nor does it in any other manner appear from the indictment, that the wound given was sufficient to cause the death. 4th. That during the adjournment of the court from day to day, and while the trial was proceeding, the jury was allowed repeatedly to separate and go to their homes and business, instead of being kept together, under the sheriff's charge, during the said adjournment, as the law absolutely requires, for the purpose of preventing undue prejudices and influences from reaching the jury and determining the verdict, as actually happened in this case."

Were the court to confine its examination to those points alone upon which its judgment is based, the fourth reason which was assigned why the judgment should be arrested, would be sufficient for that purpose; but believing it important for the proper administration of the criminal law of the State, that all doubtful points should be elucidated and finally settled whenever practicable, so as to furnish a proper guide for the inferior tribunals, the various reasons assigned for the reversal of the judgment will be examined, and in the order in which they are presented by the record. And first, as it regards the affidavit of the discovery of new testimony. This court has already said, in the case of *The State v. Clark*, ante, 533, *that it is not sufficient to warrant the granting of a new trial, that the newly discovered evidence might have the effect of throwing a shade of doubt over some of the incidental circumstances of the trial; it should appear to be of so decided a character, that if admitted, it would give an acquitting complexion to the case.* This opinion, the court believes, establishes the true doctrine; in other words, the testimony should appear to the court to be such as might probably produce a different verdict, to justify the court in sustaining the motion. Whether the affidavit in the present case comes within the rule here laid down, is not necessary to decide.

The four grounds urged in arrest of judgment will be examined *seriatim*, and in their order.

The argument of the counsel for the prisoner informs the court, that the indictment is not wholly in the English language, in this, that the word *extravasion*, which forms a part of the description of the cause whence death ensued, is not an English word, and consequently that the indictment is not in the language required by the constitution. The court believes that this strictness would not be required in an English court, nor by an English judge. In 1st Chitty, p. 141, (Riley's edition, 1819,) it is stated, that this strictness does not so far prevail as to render an

indictment invalid, in consequence of the omission of a letter, which does not change the word into another of a different signification, as *undertood* for *understood*, and *recevd.* for *received*. It is also laid down, that every indictment must charge with such certainty and precision, that it may be understood by every one. Now if it be admitted that there is no such word in the English language as *extravasation*, neither is there any such word as *undertood*, which latter word in England was considered amply sufficient and explicit, and sufficiently precise to be understood by every one, and therefore that the prisoner should not be permitted to pretend ignorance of what every one else understood. If the prisoner in the present case complain, that he does not understand the word *extravasation*, neither would he have understood the word *extravasation* (the word intended to be used, as admitted in the argument,) if that word had been used, and which would have been unobjectionable. Comprehending the word *extravasation*, therefore, which he would have been bound to do had it been found in the indictment, it is difficult to conceive how he could have been bewildered by the substitution of the word *extravasation*. Knowledge of the genuine word would have furnished an unerring guide to the meaning of the substitute. The charge however is properly laid in the indictment, if the objectionable word were entirely omitted, as surplusage, which the court was authorized to do. *Vide State v. McCoy and others*, decided by this court at its last term. Formerly in England, the judges felt themselves constrained to adhere so strictly to form, that public justice was in many cases evaded, and the most dangerous malefactors let loose upon society, in consequence of the omission of some senseless and unmeaning form. The failure on the part of the prosecution to dot an *i*, or to cross a *t*, or something equally absurd, was considered sufficiently fatal to vitiate the whole proceedings. Substance was sacrificed to form, or rather form became substance, and substance mere form. A more correct and just appreciation of criminal justice has banished from the English courts these legal absurdities, which answered no other purpose than to protect and screen the guilty from the just punishment of their crimes. They will no longer permit the guilty man to escape punishment by averring that he cannot comprehend, and does not understand, what is palpable and evident to the common sense of every body else. True, these modern changes may not have the binding force of law in Louisiana; still it is believed, that the principles of justice should and must be the same every where, and should be carried out upon all occasions, when not prohibited by positive legal enactment. Without inquiring whence the English courts and English judges derive authority for these wise, salu-

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tary and indispensable changes, that authority was undeniably confided to the courts of criminal jurisdiction in Louisiana, by the act of 1805, introducing the common law of England; this train of reasoning is applicable to, and disposes of, the first, second and third reasons filed in arrest of judgment. *Vide* for the description of the wound, *The State v. McCoy and others*, already referred to.

The separation of the jury, this court is of opinion, is fatal to the regularity of the proceedings of the court below, and entitles the accused to relief. This ground not being apparent upon the record when the motion was made, offered no cause to arrest the judgment; but the fact that the jury *did* separate, being shown to this court *now*, by the transcript filed and proceedings had in the lower court, will be examined as if offered on the motion for a new trial, which was the proper course.

The decisions upon this point, both in the United States and in England, have been various and contradictory. In early times, the rule was unbending, that the separation of the jury was fatal to their verdict, and in cases where the court was obliged, *ex necessitate*, to adjourn, the jury was placed in charge of a bailiff, who was sworn to keep them together. 6 Durnf. & East, 530. In modern times the rigor of this rule has, in many instances, been relaxed; but the decisions are so contradictory and conflicting that the question may still be fairly considered unsettled. Thus in Virginia the old rule prevails, and a separation of the jury is fatal to their verdict. In North Carolina the decisions are *both* ways. 1 Haywood, 241; 2 Haywood, 238. So in New York, in *McLeod's Case*, as reported by Gould, page 16, the court directed the sheriff to provide lodgings and places to take their meals for the jury, as it would be necessary to keep them together during the whole of the trial, and to provide them with accommodations as near the court as possible. Graham on New Trials, 91, *et seq.* 1 Chitty, 628. Roscoe, Crim. Ev. 178. *Aliter* in Kentucky. The point appearing thus unsettled and *sub lite*, this court feels itself authorized to give a preference, and to adopt that rule which seems to offer the greatest security to the accused, and, at the same time, trenches in nowise upon any right necessary to ensure the due and proper execution of the law.

In *capital* cases, the jury should not be permitted to separate after they have been sworn, either with or without the consent of the prisoner. This rigor which the court conceives to have been the *universal* practice in the country parishes, can lead to no bad consequences. This precaution is necessary to protect the accused from any undue influence which may be exercised upon the members of the jury, even without their knowledge, and can-

not be tortured into a disparagement of their integrity. Improper impressions may and will be made upon their minds by artful and designing men, of which they may be perfectly unconscious; neither can they shut their ears to the expression of popular opinion; and as well might the administration of the juror's oath be considered as conveying a doubt of his integrity, as this temporary seclusion from intercourse with the community at large. In cases *not* capital, courts may, in their discretion, permit the jury to disperse until after they have received the charge of the court; but they should not be permitted to separate after the charge has been given. In *these* cases, misconduct on the part of the jury will set aside their verdict; in capital cases, upon a separation, misconduct and abuse will always be presumed.

One other question still remains to be examined, viz. the *extent* of the right guaranteed to the accused by article 6, section 18, of the constitution of the State. The section reads as follows: "In all criminal prosecutions the accused shall have the right of being heard, by himself or counsel, of demanding the nature and cause of the accusation against him, of meeting the witnesses face to face; of *having compulsory process for obtaining witnesses in his favor,*" &c.

In the present organization of our courts having criminal jurisdiction, no power is given to them to coerce the personal attendance of witnesses except within restricted territorial limits. The process of no court of original criminal jurisdiction is co-extensive with the State. No statutory provision clothes the Criminal Court of New Orleans, (*exempli gratia,*) with authority to coerce the personal attendance of Kelly, the witness in this case, who resides in Bayou Sara; and yet this constitutional provision, at first blush, would seem to confer a right upon the accused of which the Legislature could not deprive him, by making him amenable to the jurisdiction of a court, inefficient, from want of authority, to enforce this constitutional enactment; but to a proper understanding of this article in the constitution, it is necessary to revert to the cause and origin of the principle thus consecrated, not only in our own constitution, but in that of the United States, and of many of our sister States. It should be remembered, that this right was in former times, in England, withheld from the accused; not only were they denied the right of issuing process for their witnesses, but the witnesses, (if present,) were not permitted to be sworn; the right was at length extorted from the government by the people, and considered at the time an extraordinary *concession*, not a privilege or absolute right. Our forefathers, recurring to the time when the people had no such right, and the difficulty with which it was wrested from the government, incorporated the principle into the constitution, and

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made it a part of the fundamental law of the land, whence it has been copied into most of the constitutions of the States. Thus explained, it simply means to say, that the accused shall not be debarred the right of issuing *subpœnas* for his witnesses, as in civil cases. Such is the construction given to a similar provision of the constitution of the United States. It is merely the enunciation of a principle, which to us, in the enjoyment of all the rights of freemen, may otherwise appear uncalled for, preposterous, and too plain a proposition to require insertion in the constitution. With equal propriety might it be said, that the right secured to the accused, in the same article, of being heard by himself or counsel, and the exemption from being compelled to give evidence against himself, as also the prohibition upon the Legislature of passing *ex post facto* laws, or laws impairing the obligation of contracts, in the following section, were likewise principles too plain to require a constitutional recognition; and yet, there they are to be found, and will probably find a place in the new as well as in the present constitution.

This view of the article in our constitution is most ably illustrated by Chief Justice Spencer, in the construction given by him to the words, "nor shall any person be subject for the same offence, to be *twice* put in jeopardy of life or limb," contained in the fifth article of the amendments to the constitution of the United States. "The expression," jeopardy of limb, says this enlightened jurist, "was used in reference to the nature of the offence, and not to designate the punishment of an offence, for no such punishment as loss of limb was inflicted by the laws of any of the States, at the adoption of the constitution. Punishment by the deprivation of the limbs of the offender, would be abhorrent to the feelings and opinions of the enlightened age in which the constitution was adopted, and it had grown into disuse in England for a long period antecedently. We must understand the terms, *jeopardy of limb*, as referring to offences which, *in former ages*, were punishable by dismemberment, and as intending to comprise the crimes denominated *felonies*. The question then recurs, what is the meaning of the rule, that no person shall be subject, for the same offence, to be twice put in jeopardy of life and limb. Upon the fullest consideration, which I have been able to bestow on this subject, I am satisfied it means no more than this; *that no man shall be tried twice for the same offence*. Should it be said, that we can scarcely conceive that a principle so universally acknowledged, and so interwoven in our institutions, should need an explicit and solemn recognition in the fundamental principles of the government of the United States, we need recur only to the history of that period, and to some other of the amendments, in proof of the assertion, that there existed such a jealousy or extreme caution on

the part of the state governments, as to require an explicit avowal in that instrument, of some of the plainest and best established principles in relation to the rights of the citizens and the rules of common law ; the first article of the amendments prohibits Congress from making any law respecting an establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition government for a redress of grievances ; the second secures the right of the people to bear arms ; and indeed without going into them minutely, nearly all the amendments of that instrument indicate either great caution in defining the powers of the national government, and the rights of the people and the States, or they evince a jealousy and apprehension that their fundamental rights might be impugned, so as to leave no doubt, that in the article under consideration, no new principle was intended to be introduced." 1 Wheeler's Criminal Cases, 470, *et seq.*

This lucid exposition, given by Chief Justice Spencer, of the fifth article of the amendments to the constitution of the United States, furnishes a convincing and satisfactory key by which the eighteenth section, sixth article, of the Louisiana constitution may be opened to our examination, and its true intent and meaning eviscerated and established ; and if the authority of his name were permitted in this instance, by northern abolitionists to exercise the same influence, and to be entitled to the same respect and weight, as is conceded to it by all others, it would put to rest all cavil upon the meaning of the words "the right of the people peaceably to assemble and to petition," &c., in the first article of the amendments to the constitution of the United States.

Putting out of view, the question whether the existence of slaves in a sister State be a *grievance* against which they have a right to petition or not, it merely recognizes, if Judge Spencer's doctrines and reasoning be correct, the right of the people *to assemble and petition* ; a right, to be sure, which we can scarcely imagine could ever have been denied or called in question, did we not know, that this was the grievance of which they complained in England, where their peaceable assemblies were dispersed, by order of government (after reading the riot act,) at the point of the bayonet. The people here, therefore, (as they could have done, if no such constitutional provision existed,) may *peaceably assemble*, and petition Congress, without let or hindrance ; without having before their eyes the fear of soldiery, or their ears offended by the reading of riot acts, &c., leaving to the government afterward to make such disposition of their petitions, and to take such action, as to it may appear meet and proper. The right to assemble and petition circumscribes and comprises

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all that is recognized and all that was intended to be guaranteed to the people. Carrying out the views of Judge Spencer, and giving to his reasoning a fair and *bona fide* application, this would be its legitimate interpretation, securing to the people the right to assemble and petition, and neither purporting nor intending any enactment restrictive of the power of government to make any disposition it pleased, of the petitions when presented.

From this view we deduce, that the courts of criminal jurisdiction, not being vested with power beyond a certain prescribed and defined limit, compulsory process cannot issue beyond said limit; that the accused has an undoubted right under the constitution, to have his witnesses heard, whether they be found within or beyond said limits; that the provision of the constitution allowing the accused to be confronted with the witnesses against him, is a personal privilege which he may waive; that being entitled to a speedy trial and to compulsory process to enforce the attendance of his witnesses, this latter right can only be exercised when the witness resides or is found within the district; that the Legislature having failed to provide means to coerce the personal attendance of the witnesses, it follows as a necessary corollary, that recourse must be had to the ordinary and only remaining method of procuring testimony, viz: by commission.

Wherefore it is ordered, that the judgment of the criminal court be set aside, cancelled and annulled; that a new trial be granted; and that the said criminal court conform to the principles herein established, upon the trial and prosecution of the appellant, Leonard C. Horusby.

THE STATE v. ABRAHAM DUNCAN.

In prosecutions for larceny, or other criminal proceedings of the same kind, the prisoner cannot require the testimony to be reduced to writing.

A question which does not indicate the answer expected from the witness, but merely directs his attention to the subject in relation to which he is to testify, is not a leading one. A leading question is one which suggests to the witness the answer he is to deliver.

It is the universal practice in this State, both in criminal and civil proceedings, to permit a witness after having been examined in chief, consigned and cross-examined, to be again examined by the party by whom he was introduced upon points touching which he had not before testified, or to be subsequently recalled and interrogated in relation to material facts, not before elicited or referred to, either from inadvertence or ignorance of their being within the knowledge of the witness.

The declarations of third persons, though not under oath, are admissible in evidence, where they form a part of the *res gesta*. Thus, on an indictment for horse stealing, a witness may state, "that on a certain night a negro servant

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came to witness and told him, that a man had offered him a dollar to get him a horse, and that the negro promised to steal the horse and take him to the man; and that witness told the negro he could do as he had promised." The statement is admissible to show the circumstances under which the horse was sent, and the agency of the witness in sending him.

Where one has been notified of a design to steal his goods, which he neither originated nor suggested, he may, in order to detect the thief, direct a servant or agent, to encourage the design, and afford facilities for the completion of the crime; and such facilities will not affect the criminality of the thief.

The words "a true bill," as well as the capacity of the foreman, may be endorsed on an indictment by any person, under the direction of the grand jury. It is only necessary, that the finding should be signed by the foreman.

APPEAL from the District Court of Carroll, *Willson, J.*

Preston, Attorney General, submitted the case on the part of the State.

Browder and Bryan, for the appellant.

KING, J. The defendant, Abraham Duncan, having been convicted of horse stealing, and sentenced to imprisonment at hard labor, has appealed from the judgment of the District Court. The alleged errors which he seeks to have corrected in this court, are set forth in several bills of exceptions which accompany the record, and in an assignment of errors submitted by his counsel.

The first ground of complaint is, that the judge refused to cause the evidence adduced upon the trial to be taken down in writing by the clerk. We are aware of no law which requires the testimony to be reduced to writing in criminal proceedings of this kind.

The second bill of exceptions is in these words: "The district attorney put the following question; 'Did the prisoner, or did he not, state in what the negro had betrayed him?' This question was objected to because it was a leading one; and because the witness had been consigned by the district attorney previously, and could only be questioned by him on matters growing out of the cross-examination, and that this inquiry did not grow out of the cross-examination."

A leading question is one which suggests to the witness the answer he is to deliver. The question referred to appears to be free from this objection. It does not indicate the answer which is expected, but merely directs the attention of the witness to the subject, in relation to which he is to testify. In this it offends against none of the rules of evidence.

The strictness of practice in the English courts seems to require, that the re-examination of witnesses should be confined to the subject matter of the cross-examination. Many of the rules with regard to the examination of witnesses, and the introduction of evidence have been much relaxed. It is understood to be now the universal practice of the courts of this State, in both civil and criminal proceedings, to permit a witness, after having been ex-

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amined in chief, consigned and cross-examined, to be again examined by the party introducing him, upon points touching which he had not before testified; and subsequently to be recalled, and interrogated in relation to facts material to the issue, which had not been previously elicited or referred to, either from inadvertence or ignorance, that they were within the knowledge of the witness. In civil cases, it has been held, that it is discretionary with the court to permit witnesses to be introduced, even after both parties had announced that the evidence had been closed. The exercise of such a discretion may frequently be as important to the safety of the accused, as to the interest of the State.

In answer to the question propounded by the counsel for the accused to witness; "Did you send the horse on the night in question for the prisoner to ride, or did you cause the horse to be delivered to him?" the answer was given; "That on the night in question, the confidential servant of Mr. O. came to witness, between eleven and twelve o'clock, and told him that a man had offered him a dollar to get him a horse, and five dollars to get him a horse, saddle and bridle, and the negro promised to steal and take the horse to him. That witness told the negro he could do as he had promised." The answer was objected to;* but the court permitted it to go to the jury, "for the purpose of showing the circumstances under which the horse was sent, and the agency of Aaron Goza in sending the horse, and so instructed the jury." We are of opinion that the court did not err. The evidence objected to formed a part of the *res gestæ*, and, as such, comes within one of the exceptions to the inadmissibility in evidence of the declarations of third persons, not made under oath. It has been settled, that if it be material to inquire, whether a certain person gave a particular order on a certain subject, what he has said or written may be evidence of the order. Or where it is material to inquire whether a certain fact has come to the knowledge of a third person, what he has said or written may as clearly show his knowledge as what he has done. 1 Phil. Ev. 234. Roscoe's Crim. Ev. 20, 21.

It has been assigned as error, that the instructions of the judge to the jury were incorrect. His charge was in the following words; "If the confessions of the prisoner were made under any influence produced by promises or threats made, they should not

* It appears from the bill of exceptions that the counsel for the prisoner, who had propounded the question to the witness on his cross-examination, "objected to that portion of the answer which detailed declarations of the negro, on the ground that the witness could only state what he himself did, and not what the negro told him that the prisoner had said."

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be taken as evidence against him. Further, if George Goza delivered, or caused to be delivered, the horse to the prisoner, or whether or not George Goza was so authorized; if the prisoner thought he was, and delivery was made by the knowledge of prisoner, and he took him under the said delivery, and not with a view of stealing him, he is not guilty. But if the prisoner thought he was stealing the horse, and George Goza or William Goza permitted the negro to take the horse, and place him where the prisoner could with greater facility steal him, he is guilty of larceny."

We presume that it was intended to object to the latter part of the charge. A material ingredient in the crime of larceny is, that the goods should be taken without the consent of the owner. It has been held, however, that where the owner has been notified of a design formed to steal his goods, which intent he did not originate or suggest, he may, in order to detect the thief, direct his servant or agent to encourage the design, and afford facilities for the completion of the crime, and that the facilities afforded under such circumstances will not affect the criminality of the thief. 2 Russ. 1047. 2 Chitty Crim. Plead. 920. We are of opinion that the charge of the judge was correct. A motion was made in arrest of judgment, upon the ground, "that the jury were improperly and illegally constituted; that the bill of indictment was found by incompetent jurors; and that the foreman of the grand jury did not endorse on the bill "*a true bill*," but it was admitted by the district attorney, that he had himself endorsed on the bill "*a true bill*."

The record furnishes us no means of ascertaining whether any of these alleged irregularities exist. Considering, however, the admission of the district attorney to have been made, his act was not one which would vitiate the indictment. The words "*a true bill*," as well as the capacity of the foreman, may be endorsed upon the indictment by any person under the direction of the grand jury. It is only necessary that the finding should be *signed* by the foreman; and it is not pretended that this formality was not observed in the present instance.

Judgment affirmed.

The State v. Brown.

THE STATE v. THOMAS BROWN.

On a trial for perjury, the prosecuting attorney, after opening the case on the merits and being followed by the counsel for the prisoner, discovered a defect in the indictment, and moved the court for leave to enter a *nolle prosequi*, which was granted, and the jury was discharged and the prisoner remanded to jail. Another indictment having been found against the prisoner for the same offence; *Held*, that no verdict of guilty or not guilty having been rendered, there was no trial; and that the entering of the *nolle prosequi*, and the discharge of the jury without the consent of the prisoner, could not support a plea of *autrefois acquit*. *Per Curiam*. To render the plea of a former acquittal a bar, it must be a legal acquittal, by judgment upon trial, for substantially the same offence, by a verdict of a petit jury.

Where in a prosecution for perjury, the indictment charges that the perjury consisted in the prisoner's falsely swearing that, "*shortly after the assault and battery committed by P. on the body of D., M. took the said D. by the collar, threw him down and kicked him;*" and negatives the truth of the oath by averring that, "*in truth and in fact the said M., after the assault and battery committed by P. upon the body of the late D., did not take the said D. by the collar, nor throw him down, nor kick him, nor commit any battery on him,*" it is sufficient. It was not material to the issue to negative any assault or violence to the person of D. anterior to the assault and battery committed by P.

APPEAL from the Criminal Court of the First District, *Canonge, J.*

Preston, Attorney General, submitted the case on behalf of the State, without argument.

Sever, for the appellant.

JOHNSON, J. In April of the present year, the grand jury of the First District, presented a bill of indictment for perjury against the defendant, who, on his arraignment, pleaded not guilty, and the trial progressed until the argument was opened on the merits to the jury by the district attorney, who was followed in the defence by J. G. Sever, Esq. At this stage of the proceedings the district attorney, discovering a flaw in the indictment, moved the court for permission to enter a *nolle prosequi*, which being granted, the jury were discharged from the further consideration of the case, and the accused was remanded to prison. A few days after, the grand jury presented another bill of indictment for the same offence against the defendant. On this new bill he was tried and convicted; and two assignments of error, filed by counsel in this court are relied on, to support the appeal; the first of which is, that the first prosecution was, in contemplation of law, a trial, and the entering of the *nolle prosequi* at the time it was entered, and the discharge of the jury without the consent of the defendant, were equivalent to an acquittal, which barred any subsequent trial for the same offence. This objection we are to consider as in the nature of a special plea in bar, which regularly

ought to have been interposed in the court of the first instance; but we can see no good reason for denying to the accused the full benefit of a discussion of the question in its present condition. To sustain the position, the fifth article of the amendments to the constitution of the United States is invoked, which contains this provision; "Nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb." This constitutional prohibition is a re-affirmance of a *magna charta* maxim of the common law, from which its true meaning has been sought by enlightened jurists, and is now settled, as we understand it, to mean only, that *no man shall be tried a second time for the same offence, after a trial by a competent and regular jury upon a good indictment, whether the verdict be one of acquittal or conviction.* Vide *The People v. Goodwin*, Wheeler's Criminal Cases. *United States v. Pedro Gibert and others*, 2 Sumner's R. 19. What then is the test by which we must ascertain and determine whether a person has been once tried? The answer, as it appears to us, is, that it can only arise on a plea of *autrefois acquit*, or on a plea of *autrefois convict*; and that *autrefois acquit* or *convict* is a good and valid plea, only when the verdict of acquittal or conviction has actually been rendered on a sufficient indictment; hence it follows, that a conviction upon an indictment defective in form, so that no judgment could be pronounced, but one of arrest, ought not to be successfully pleaded in bar of a subsequent prosecution for the same offence. Obviously, because the defendant was never in jeopardy by the first. And it follows again, that an acquittal before a tribunal not competent to try, is void, as *coram non jūdice*, and no bar to a second indictment for the same offence; although an acquittal by a competent jury, upon an insufficient indictment, is a finding in the last resort, which will protect the defendant against a second prosecution for the same offence. A defendant, on an insufficient indictment, may demur, and have the judgment of the court discharging him; or, if he prefers taking the chances of an acquittal, and is tried and convicted, he may be discharged on motion in arrest of judgment; but in neither event will his discharge operate as a bar to another prosecution for the same offence. The question then recurs, has the defendant, in this view of the subject, in a legal sense, been either acquitted or convicted by the verdict of a jury? This was not the argument; but it is urged, that the *nolle prosequi* and discharge of the jury, under the circumstances, were equivalent to an acquittal in judgment of law. This reason is illegal and illogical, unless it can be made to appear, either that the law officer of the State was without authority at that stage of the prosecution to quash, or, if he possessed the power, that the exercise of it, after the evidence

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had closed and the arguments to the jury had been opened, operated an acquittal, which would bar a second prosecution in virtue of the constitutional prohibition cited, and the common law maxim on which it is based. From our investigation, we suppose there is no doubt, that the law officer of the State may, at any time before a defendant has actually been tried, on an application to the court, have an indictment quashed, if the prosecution is in good faith, and not instituted from malicious motives, or for the purposes of oppression; especially, if it also appears, that the indictment is so defective in form that no judgment on conviction could be pronounced on it. Archbold, *verbo* Indictment, 7th section. And we can perceive no difference in this rule when it is applied to the right and power of the prosecuting officer to enter a *nolle prosequi*, under similar circumstances. But in either case, whether on motion to quash an indictment, or to enter a *nolle prosequi*, the presiding judge will take care to prevent abuse and oppression, by not permitting a capricious, arbitrary, or malicious exercise of the power. How then, can it be contended, that the entering of the *nolle prosequi* and the discharge of the jury have resulted in an acquittal of the defendant? There was no verdict of guilty or of not guilty rendered in the case, and, therefore, no trial. The indictment, as the ground of the *nolle prosequi*, was averred to be insufficient; which has been repeated in the assignment of error under review. The permission of the court was obtained; good faith, and not malice, seems to have influenced the conduct of the district attorney, and there is no alternative but the conclusion that, in a legal sense, the defendant, on the first indictment, was not in jeopardy, so as to exclude another prosecution for the same offence. In the case of *The People v. Olcott*, 2 Johns. Cas. 301, it was decided by Judge Kent, that "the discharge of the jury in criminal cases must rest with the judge, under all the particular or peculiar circumstances of the case;" and in the case of *The People v. Goodwin*, Spencer, Ch. J., held, that "the power to discharge a jury in a criminal case, is a delicate and highly important trust, and extends as well to felonies as misdemeanors." In both of these cases the question arose, whether, after disagreement of the jury, when there was no prospect of their agreeing in a verdict, and they were, in consequence, discharged, the defendants were acquitted in law, or whether they could be re-tried. A *venire facias de novo* was awarded in both cases, and the hypothesis of an acquittal, on the ground urged, was exploded as an antiquated fiction. In further illustration, Kent holds this emphatic language; "If the court are satisfied that the jury have made long and unavailing efforts to agree, that they are so far exhausted as to be incapable of further discussion and deliberation, *this becomes a case*

of necessity and requires interference." This able jurist further observes; "All the authorities admit, that when any juror becomes mentally disabled by sickness or intoxication, it is proper to discharge the jury; and whether the mental disability be produced by sickness, fatigue, or incurable prejudice, the application of the principle must be the same." To the same end Judge Story, in *The United States v. Coolidge*, declares, that "the discretion to discharge a jury existed in all cases; but that it was to be exercised only in very extraordinary and striking circumstances." We conclude, therefore, that there can be but few of the profession who now advocate the heresy, that after a jury in a criminal case are once sworn, no other jury, under any possible circumstances, can be lawfully sworn and charged in the same case; although it is perfectly familiar to every lawyer, that systems of law give up their uncouth barbarisms and "unseemly niceties" slowly and reluctantly. To sustain our opinion further, we cite a few common law authorities. Blackstone, vol. 4, p. 355, says; "To render the plea of a former acquittal a bar, it must be a legal acquittal, by judgment upon trial, for substantially the same offence, by a verdict of a petit jury;" and in Chitty, C. P., 376 "it is laid down, that in order to plead the plea of *autrefois convict* with effect, the crime must be the same for which the defendant was before convicted, and the conviction must have been *lawful on a sufficient indictment*; and that this plea, like that of a former acquittal, is of no avail when the first indictment has been quashed for invalidity, or is ultimately arrested on motion. The proceedings will be set aside and judgment of acquittal will be given; but it will be no bar to a subsequent indictment, which the prosecutor may immediately prefer. Hawkins and Hale recognize the same doctrine; but it is unnecessary, we presume, to multiply authorities, for we are well satisfied, that the *nolle prosequi* was right; that the discharge of the jury was a discreet exercise of the powers of the court; and that the defendant, under the first indictment was not in a legal sense, tried, and was not *legitimo modo acquittatus*.

This being the case, we pass to the consideration of the second assignment of errors, which is, that the indictment is bad, because the negation of the truth of the defendant's alleged oath, is confined to what took place "after the assault and battery committed by Peter McLoud upon the body of the late Dougald Leitch," and does not extend to or embrace any other period of time, before or after the said assault and battery by McLoud. The perjury charged in the indictment is upon that part of the oath of the defendant, where he swears, "that *shortly after* the assault and battery committed by Peter McLoud upon the body of

the late Dougald Leitch, Martin Lawson took the said Dougald Leitch by the collar, threw him down, and kicked him," the truth of which is thus negated; "whereas, in truth and in fact, the said Martin Lawson, *after* the assault and battery committed by Peter McLoud upon the body of the late Dougald Leitch, did not take the said Dougald Leitch by the collar, nor throw him down, nor kick him, nor commit any battery on him." There would be irresistible force in the objection raised, if the oath on its face did not plainly show, that the only point material to the matter before the court was, the alleged violence of Martin Lawson to the person of Dougald Leitch, *after* Peter McLoud had committed the assault and battery upon the body of Leitch. This is the matter wherein the perjury is assigned, and it has been negated as clearly as the English language has the power to do it. Proof, at the trial, that Martin Lawson did, or did not, commit violence on the person of Dougald Leitch *anterior* to the assault and battery committed by Peter McLoud was not material to the issue, and by consequence, there was no necessity that it should appear in the indictment. The perjury assigned in the oath is, that Lawson, shortly after the assault and battery of McLoud, took Leitch by the collar, &c.; the materiality of which, in reference to the design of the oath, is to show that the injuries of Leitch, which brought him to the grave, were the result of wrongs done by Lawson, and not by Peter McLoud, who had committed an assault and battery on Leitch, and it is the falsity of the oath in this respect which constitutes the perjury. In this view we cannot think that it was essential to negative in the indictment, the idea that Martin Lawson may have committed violence on Leitch at any other time or in any other way than as it is averred.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF ERRORS AND APPEALS,
IN
NEW ORLEANS, FEBRUARY, 1845.

PRESENT:

HON. THOMAS C. NICHOLLS.
HON. GEORGE ROGERS KING.
HON. ISAAC JOHNSON.

THE STATE *v.* DANIEL TURNELL ADAMS.

Where the record of appeal in a criminal case contains neither bill of exceptions, nor assignment of errors apparent on the face of the record, the case cannot be examined. Stat. 6th April, 1843, § 2.

In an appeal from a judgment in a criminal prosecution, the appellant must spread upon the record so much of the testimony as may be necessary to enable the court to which the appeal is taken to determine, with certainty, whether any error has been committed by the court of original jurisdiction. This may be done by embodying a synopsis of the testimony in a bill of exceptions.

APPEAL from the Criminal Court of the First District, *Canonage, J.*

This case was submitted, without argument, by *Preston*, Attorney General, on behalf of the State, and by *Sever*, for the appellant.

NICHOLLS, J. This case comes before the court, neither by bill of exceptions nor by assignment of errors, the only legitimate shape which would authorize the Court of Errors and Appeals to entertain jurisdiction in the premises. The act of the Legislature organizing this court has restricted its powers to the examination of questions of law, "which questions shall be presented by bills

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of exceptions taken to the opinion of the judge of the lower court, or by the assignment of errors apparent upon the face of the record, taken and made in manner and form as now provided by law for appeals in civil cases." It necessarily follows, therefore, that no relief can be extended by this court to the party convicted, in the absence of both these essential pre-requisites, neither of which are furnished by the record in this case.

An improper refusal on the part of the judge of the lower court to grant a new trial, this court has already decided, in the case of *The State v. Jacques Charlot*, ante, p. 529, would entitle the party aggrieved to relief; and if the record in this instance afforded to the court the means of testing the correctness of his decision, that relief would be extended by the correction of any error he may have committed on the trial. But it is the duty of the appellant, under penalty of having his appeal dismissed, to spread upon the record, so much of the testimony as will enable the court to pronounce, with certainty, whether any error had been committed, on the trial in the lower court. This course has been adopted in the State of New York, (7 Wend. 331,) and appears free from objection. A synopsis of the testimony, so far as necessary for the elucidation of the point, should or might be embodied in a bill of exceptions, thus enabling the Court of Appeals to act *knowingly* in the premises.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF ERRORS AND APPEALS,
IN
NEW ORLEANS, JULY, 1845.

PRESENT:

HON. THOMAS C. NICHOLLS.
HON. GEORGE ROGERS KING.
HON. ISAAC JOHNSON.

THE STATE v. MATHEW J. JONES.

The statute of 6th April, 1843, creating the Court of Errors and Appeals, authorizes an appeal on behalf of the State, from a judgment quashing an indictment for an assault with a dangerous weapon, and with intent to kill. Sec. 2.

The statute of 6th April, 1843, establishing the Court of Errors and Appeals, does not violate any provision of the constitution. It is not inconsistent with either the first or fourth sections of the fourth article of the constitution. The court established by the act of 1843, though a court of the last resort, is not a *Supreme Court* within the meaning of sec. 1, of art. 4 of that instrument. The term *supreme*, as used in that section, was intended to designate the independence of the court of any legislative control.

The stat. of 26th January, 1844, exempting the inhabitants of the parish of Rapides, residing on the west side of the river Calcasieu and bayou Sépa, from serving as jurors, cannot be considered as infringing the right secured by sect. 18 of art. 6 of the constitution to persons prosecuted in that parish by indictment or information, of having a trial by an impartial jury of *the vicinage*.

APPEAL from the District Court of Rapides, *King, J.*

Preston, Attorney General, for the State, appellant, in contending for the right of the State to appeal in this case, admitted that no appeal could be prosecuted by the State so as to affect a verdict of acquittal.

O. N. Ogden, for the prisoner. The State has no right to an

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appeal in a criminal case, none having been granted by the statute of 1843, creating the court. The act creating the court was unconstitutional. This court, having jurisdiction over the whole State, and in the last resort, cannot be considered an "inferior court," such as the Legislature has authority to create. The inferiority of a court must be determined by its powers and extent of jurisdiction.

NICHOLLS, J. The defendant, by his counsel, moves the court to dismiss this appeal, for this; "That there is no provision in the law establishing the Court of Errors for an appeal by the State; and such a right, as affecting the personal security and the liberty, and even the life, of a citizen, cannot be exercised unless it has been expressly or clearly granted."

The question embraced in this motion is of vital importance, and on its decision is involved a principle upon which the criminal jurisprudence of the State will mainly rest. It has been urged upon the court, with great weight of argument, that the circumstance of such right having, in no one of our sister States, ever been accorded to the commonwealth, shows conclusively the universal opinion entertained by their respective law makers, that public policy did not require such interpolation upon the principles consecrated by the common law of England; that the exercise of such a right would trench upon the liberty of the citizen, contravene the mild and just principle of the law securing him from a second trial for the same offence; abrogate the constitutional provision guarantying him a trial by jury; and, finally deny him that speedy trial which is secured to him by the same instrument.

The examination of these various questions furnishes matter of grave consideration, and the different aspects they present entitle them to the most solemn and serious investigation of the court, inasmuch as they do, at first blush, (we are ready to admit,) carry with them obstacles to the exercise of the right of appeal on the part of the State, not only formidable, but almost impossible to be removed. Difficulties beset us on all sides. On the one hand, the acknowledged truth of the absence of any statutory provision to that effect in most of our sister States; the novelty of the attempt now made, for the first time since the institution of this court, to appeal from the decision of the court, *a qua*, in favor of the accused; and last, not least, the general opinion of the bar, (so far as we have been enabled to ascertain it,) not only against the policy, but against the constitutionality of such a course of procedure. On the other hand, the plain unambiguous phraseology of the law, establishing this court, the unrestricted grant of the right of appeal in the act of 1843, the admitted *power* of the Legislature to pass all laws which it may

deem proper, subject only to the constitution of the United States, and to the constitution of the State of Louisiana. All these conflicting, complicated, discordant, but, at the same time, rational views and interpretations of the laws, which have given rise to the question at issue, admonish the court to approach its investigation with a proper sense not only of its importance, but of the intrinsic difficulty involved in the examination.

"An act to establish a Court of Errors and Appeals in criminal matters, and for other purposes," is the title of the act organizing this court. Having established the court and given it a name in the first section, the act proceeds, in the second section, to enact; "That this court shall have appellate jurisdiction, with power to review questions of law, which questions shall be presented by bills of exceptions taken to the opinions of the judge of the lower court, or by the assignment of errors apparent on the face of the record, taken and made in manner and form as now provided by law for appeals in civil cases." In this section is comprised all the power and authority with which the Legislature thought proper to clothe this court. The words, as already stated, are plain and unambiguous. The court is thereby vested with authority to review questions of law—all questions of law, with this restriction, that *the question be presented by bills of exceptions or by assignment of errors apparent upon the record, taken and made in manner and form as now provided by law for appeals in civil cases.* It follows then, if we confine ourselves to the requisitions of the statute, that if an appeal be taken upon a question of law, made to appear by bill of exceptions, or patent on the record, and in manner and form as now provided by law for appeals in civil cases, we are bound to entertain jurisdiction. This appeal is prosecuted before us under the second section of the act of 1843. It does present a question of law, under a bill of exceptions, and *is taken and made in manner and form as now provided by law for appeals in civil cases.* Are we at liberty to reject it, upon a fancied presumption that the Legislature did not intend to say what they have said, in language so plain, so unambiguous, so emphatic, that this court cannot mistake its meaning? Upon us it is imperative; it enjoins, it *orders* us to take jurisdiction, if the appeal be taken in the manner pointed out by the statute. By dismissing the appeal, this court would not declare, but make the law. Neither has this, or any other court, a right to make a distinction where the law has made none. *Ubi lex non distinguit, nec nos distinguere debemus.* The second section of the fourth article of the constitution enacts; "That the Supreme Court shall have appellate jurisdiction only, which jurisdiction shall extend to all civil cases, when the matter in dispute shall exceed the sum of three hundred dollars." In all

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the various acts passed by the Legislature, granting appeals from the judgments of the courts created by them, no distinction is made between the plaintiff and defendant, intending the right to be reciprocal. The language invariably used is similar to that found in the constitution; such is the language organizing this court. Strike from the title of the act of 1843, the words, "in criminal matters," or rather substitute the words, "in civil matters," for those erased, then read the first and second sections of of the said act, and no one would have the hardihood to aver, that the right of appeal was not reciprocal—conferred by the act upon both plaintiff and defendant. No other interpretation can be given to the words used; they admit no other interpretation. Shall we (*in favorem vitæ* as is erroneously pretended,) assume the right to repeal an act passed by the Legislature, upon so vain and frivolous a pretext as this—veiling this arrogant assumption of authority by another assumption equally arrogant, and beyond our power, viz., that of altering the universally accepted meaning of words, by the learned and the unlearned? *One or both* of these acts *must* we do, before we declare that the second section of the act of 1843, contains words restricting the right of appeal to the *accused*. On the contrary, we find nothing in the act organizing this court, which confines the right to the accused, or which refuses it to the State.

Again, it is urged, that the concession of this right to the State would impinge upon and destroy the benignant and merciful provision of the common law, which secures the accused from the danger of being put in jeopardy twice for the same offence. This objection is more specious than solid. It is an illogical conclusion, a *non sequitur* from the premises. It by no means follows, because the State has a right to appeal, that the accused will be necessarily placed twice in jeopardy for the same offence. No better proof of the fallacy of this supposition could be required, than that which would be furnished by the record in this case, should the judgment of the inferior court be reversed. At the suggestion, and upon the motion of the party who originates the objection in this court, the indictment was quashed by the District Court, as having been found by an illegal grand jury, an indictment upon which (according to his own allegation,) no legal trial could be had. So far, then, from having been placed twice in jeopardy, the history of the case shows he has not been put in jeopardy at all. On the contrary, he has escaped scot free, without a trial. And thus would his own, and the crimes of all other offenders, committed within the confines of the Parish of Rapides, remain unpunished, and for no better reason than because the district attorney, either through ignorance or inadvertence, may have preferred a bad indictment, or because an indictment which

is good in law, (as is that on which these proceedings are based,) was by the court of the first instance considered bad, and quashed upon the motion of the accused. To prefer a new indictment, in conformity with the erroneous opinion of the lower court, would be the only alternative left the prosecuting attorney, necessarily to be quashed in its turn by this court, upon appeal, and also upon the motion and suggestion of the accused, thereby defeating the ends of justice and insuring impunity to crime. The speedy trial, (the deprivation thereof was caused by his own act and deed,) it is true, has been postponed and delayed from no act or fault of the district attorney. Add to this, that, if the argument is worth anything—if, by this appeal he be placed twice in jeopardy, the same result would follow, should the district attorney (acquiescing in the erroneous opinion of the court,) prefer a second indictment after the first had been quashed, for an alleged want of form. Thus it would prove too much; it would be a *felo de se*, and destroy itself.

Having a right to adopt the common law, either in whole or in part, (a right which will scarcely be questioned,) the Legislature might surely modify it to suit their own views of policy and consequently no want of authority could have been successfully urged, had this benign and merciful provision (as it is called,) been expressly excluded, whatever might have been said against its humanity or justice. This point, however, it is not necessary now to examine; but it is merely suggested for the purpose of showing that the fact of its forming part and parcel of the common law, constituted no estoppel to its exclusion by the Legislature, had such been their sovereign will and pleasure. When that question presents itself, it will be time enough to examine and decide it.

This record does not show a case where the accused has been placed either once or twice in jeopardy.

The novelty of this course of proceeding (an appeal on the part of the State,) exhibits nothing so repulsive as to cause this court to hesitate, if it appear eminently promotive of the ends of justice, and not incompatible with the stern requisitions of the law. The glorious declaration of independence, the constitution of the United States, the whole fabric of our free and enlightened government, were novelties in their day—novelties entwined in every fibre of the American heart, life of its life, and blood of its blood, not to be severed but with the extinction of life itself.

In referring to principles consecrated by the common law, American courts should never forget, that that circumstance alone by no means justifies the indiscriminate adoption or recognition of them, under a system of laws presenting a modification only of the common law of England, and not the common law

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itself. Blackstone eulogizes this law as *the perfection of reason*, establishing as an unerring test that what is not reason is not law; admitting, however, as do all the English authorities, the legal axiom or apophthegm, *cessante ratione cessat et ipsa lex*. Now, taking this admitted principle for our guide, (admitted alike by English and American jurists,) we should surely say, with the same independence which dictated the rule and sanctioned its application, that, whatever might be the principle recognized in England, if the reason which required its recognition and application there, did not exist in the United States, the principle could find no place under our modified system of the common law. Such would be the doctrine inculcated in England in a like contingency by the English judges—such should be the doctrine sanctioned by our courts and by our judges.

In England, in a capital case, no new trial is ever granted on the application of either the prisoner or the crown. As a corollary, necessarily deducible from this state of the law *there*, the pleas *autrefois acquit* and *autrefois convict* must always prevail, when sustained by the record. To be a bar under the *first* plea, the acquittal must be *by trial*, and by the verdict of a jury, on a *valid* indictment. Hawk. b. 2, ch. 35, sec. 1. 4 Black. Com. 335. On the second plea, (*autrefois convict*), it is averred, that he has been formerly tried and convicted; and as a man once tried and acquitted for an offence is not again to be placed in jeopardy for the same cause, so, *a fortiori*, if he has suffered the penalty due to his offence, his conviction ought to be a bar to his second indictment for the same cause, *lest he should be punished twice for the same crime*. 2 Hawk. 251. 4 Co. 394.

It will be observed, that in England this plea *must* necessarily prevail, so long as that other principle is recognized as law, (*that no new trial can ever be granted in capital cases*), otherwise the harmony of the whole body of the law would be destroyed, and the ends of justice totally defeated. Instead of its being the perfection of reason, (as its eulogists proclaim it to be,) it would be the perfection of iniquity, despotic oppression and injustice. The adoption and recognition of the first principle, (*that no new trial can be awarded in capital cases*), necessarily gave rise to the adoption and recognition of the second. The first is the parent of the second; it *could* not have been otherwise. Once convicted, the fate of the accused was sealed; the law afforded no means by which a reversal of the conviction could be effected; there was no loop hole through which he could escape punishment. To have tried him a second time for the same offence, with this conviction suspended over him, existent, unreversed and irreversible, would have been too palpably absurd and iniquitous to have been tolerated in any stage of civilization.

Having established this rule in cases of conviction, even-handed justice required, that it should be meted out in the same manner, and for the same reason, in cases of *acquittal*, both absolutely and indispensably necessary in consequence of the rule, that no new trial should be awarded in capital cases.

A vast expenditure and waste of labor, and a great display of learning, is exhibited by Judge Story, (in 2 Sumner's Rep. 37, *et seq.*) in which the power to grant new trials in capital cases is denied. The name of this distinguished jurist is a host within itself; yet his pre-eminent abilities and recondite research have signally failed to make this court a convert to his opinion. *Nulius addictus jurare in verba magistri*, the conscientious judge should consult the law itself, and the reasons on which it is founded, as a less erring guide than the opinions of any legist, however learned and profound. In the case referred to, a new trial was refused, and the prisoners condemned to suffer a disgraceful and ignominious death, by virtue of a principle, which, (according to the admissions of Judge Story himself,) sanctioned and acknowledged by all the commentators, was incorporated into the law *in favorem vitæ*, and for the special benefit of the accused. In other words, these men were condemned to be hanged, and were, accordingly, executed, under an apprehension that, if a new trial were accorded them, this *humane* principle of the law would be violated. The invocation of such a principle was a mockery of justice. This new fangled pseudo-humanity could scarcely reconcile the prisoners to their fate, nor the learned and elaborate opinion of Judge Story, occupying twenty-six pages in Sumner's Reports, convince them of the justice, mercy, or humanity of the law. It would be in vain for the court to inform them, that, through the benignity of the law, and as a special favor to them, they must be hanged *now*, lest, by granting a new trial, the constitution of the United States might be violated, and their own precious lives be put in jeopardy *twice* for the same offence. The fallacy of this kind of reasoning consists, evidently, in attempting to adopt a principle, homogeneous to the common law of England, and absolutely and indispensably necessary to make it harmonize, and consistent with itself; but which, in the United States, under a different modification of the same law, would produce a result diametrically the reverse, abrogating its humane and equitable provisions, destroying its symmetry, and visiting upon its victims the penalty of death, for no other reason than because such would be the judgment of an English court, under the common law of England, not divested of that bloody feature which the humanity and good sense of the respective States of this Union, upon adopting the common law, have expunged from the system. Admit the doctrine, that, in

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capital, as in all other cases, a new trial can be granted, and you restore the beauty and symmetry of the whole law; in which case, the fancied conflict with the provision contained in the constitution of the United States, (which provision, it will be recollected, has reference to the courts of the United States, and not to the courts of the States,) is avoided and removed.

It is next urged, on the part of the prisoner, that the Legislature, in establishing this court, transcended its constitutional powers, which were limited, and confined to the creation of inferior courts; and our attention is drawn to the first and fourth sections of the fourth article of the constitution of Louisiana. By the first section it is provided, that the judiciary power shall be vested in a Supreme Court and inferior courts; by the fourth, that the Legislature is authorized to establish such *inferior* courts as may be convenient for the administration of justice. Hence it is contended, that there can be but one Supreme Court, (*viz.*, that created by the constitution,) and that the Legislature is strictly confined to the creation (*eo nomine*) of inferior courts. Now this proposition is so incontestably true, that few can be found to controvert it; it is, in fact, a self-evident postulate, that the constitution, being the *suprema lex*, its injunctions are of stringent and binding force upon legislatures convoked by virtue of its authority, and existing solely under its sanction and control. It is equally clear and undeniable, that the courts to be erected must be *inferior* courts, otherwise they will want that constitutional sanction to breathe into them the principle of legal vitality. The investigation is thus narrowed down to the examination of the proper meaning to be attached to the word *inferior*, and to ascertain in what sense it was used by the framers of the constitution. We are asked in the argument of counsel, whether a court, to which is confided in the last resort, the question of life and death—a court by whose *fiat*, uncontrolled, and independent of all human supervision, the citizen may be deprived of his liberty, incarcerated for life in the gloomy walls of the penitentiary, and, to crown all, delivered over to the gibbet, and an ignominious death, can be called, in any sense of the term, an inferior court; or, if this be strictly and truly an *inferior* court, with what attributes would you clothe a court which would legitimately assume the title of *supreme* under the same code of laws. It is urged, that, in proportion as liberty and life are preferable to dollars and cents, is *that* court supreme (and not inferior,) to which is confided the preservation and protection of the first, over that whose mission is directed to the correction of errors in pecuniary matters, descending even to the paltry sum of three hundred dollars, the limited jurisdiction of the Supreme Court.

Were it obligatory upon this court to confine the range of its

investigation into the signification of the word *inferior* solely to the attributes of the courts, that is to say, to the greater or lesser dignity of the subject matter called in litigation before them, the argument of the accused would be irresistible, and the question at once decided; but this court conceives that it is not so bound, and that the constitution did not attach so contracted a meaning to the term. *Inferior*, it is true, is a relative term, presupposing a superior, its relations to which are indicated in the word itself; but there can be no imaginable limit assigned to the kind, the nature, or extent of the superiority on the one hand, nor of the inferiority on the other, which are as multifarious, diversified, and capricious, as the fertile imagination of the person instituting the comparison may happen to select; thus, the lion is superior to the horse in strength and courage, whilst the horse, in his turn, asserts and establishes his superiority in docility and fleetness.

We believe that the framers of the constitution used the term *supreme*, in the sense, that the court should be placed by the constitution beyond the control of the Legislature, not liable to be influenced or destroyed to suit the caprices, vacillations, and wonted mutations of the popular will—immutable and intangible by legislative enactment, and that they appropriately denominated it the *Supreme Court*. We believe, that in using the term *inferior*, that word was selected with reference to the superiority as above explained, of the supreme, or constitutional court; that sovereign and supreme, as was the source from whence the first court emanated, it was natural and proper that the constitution should have applied the epithet *inferior* to that class of courts which owed their existence to the Legislature, whose inferiority was apparent, as being themselves creatures of a higher power, to wit, of the constitution. Deplorable indeed would be the administration of criminal justice in Louisiana if this reasoning be fallacious and unsound, or rather there could be no such thing as the administration of criminal justice at all. No court being competent to take cognizance of crime—banished by its organic law from the portals of the Supreme Court, and the doors of all inferior courts hermetically closed against admission, criminal prosecutions would have found their death wound in the adoption of the constitution, and, incapable of revival during its existence, they must necessarily have remained in a state of suspended animation until resuscitated by the new constitution; for the Supreme Court, true to the mandate of its creation, correctly repudiated all criminal jurisdiction, in the case of *Laverty v. Duplessis*, 3 Mart. 42. Thus, it would necessarily result, that (if in defining the word *inferior*, we be restricted to the subject matter coming within their jurisdictions, respectively, *ratione*

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materiae, that court is superior to which is confided the life and liberty of the citizen; then all courts of criminal jurisdiction, *ex vi termini*, being *superior*, are obnoxious to the constitutional prohibition. A curious anomaly, *hiatus*, or *casus omissus* would be detected in our code of laws; a violation of a criminal statute could be visited by no punishment; in fact, the whole body of the criminal law would, by one fell swoop, be virtually repealed.

Having disposed of these preliminary questions, it remains to ascertain, whether the indictment was properly quashed in the District Court. The jury having been drawn in conformity to an act of the Legislature, passed the 26th January, 1844, the accused moved the court that the panel be quashed, *the jurors not having been drawn agreeably to the requirements of the constitution*. That act provides, that hereafter, the inhabitants residing on the western side of the river Calcasieu and bayou Sépa, shall be exempt from serving as jurors in said parish, any law to the contrary notwithstanding.

The violation complained of consists in having curtailed the territorial limits whence the jury should have been drawn, thereby depriving the accused of a trial by an *impartial jury of the vicinage*, guarantied to him by the 18th section of the 6th article of the constitution. This court is of opinion, that it never was contemplated that the then territorial divisions should remain for ever intact and inviolate, nor that the Legislature, in the organization of inferior courts, either as regards their territorial extent or subject matter of jurisdiction, was intended to be cramped by this provision in the constitution upon which the accused succeeded in quashing the indictment; that the Legislature had clearly the right to make the jurisdiction of the district courts, embrace the whole extent of a county, or limit it (as they have done,) to the lesser circle of a parish; that that *jury* is an impartial one, which the Legislature declares impartial; and that that section of country whence the jury is ordered to be drawn for the court which is seized of jurisdiction over the offence, comprises the constitutional vicinage to which the party accused is entitled. It has never been doubted that the Legislature could prescribe the legal qualifications of jurors, elevating or depressing the standard as they thought proper. No good reason can be assigned why they may not exercise the same right as respects territory. An abuse of both powers is *possible*, though not to be supposed.

Wherefore, it is ordered, that the judgment of the District Court be set aside and annulled, that the indictment be reinstated on the docket, and that the District Court be ordered to proceed on the premises according to law, and agreeably to the principles laid down in the foregoing decision.

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JOHNSON, J, in concurring with the opinion pronounced by Judge *Nicholls* on all other points, expressed his dissent from so much as recognized the right of the State to appeal.

THE STATE v. JOHN M. BARRETT.

APPEAL from the District Court of Rapides, *Boyce*, J.

NICHOLLS, J. This case presenting the same points as that of *The State v. Jones*, just decided, the judgment of the District Court is reversed, for the reasons contained in the opinion of the court, in that case.

Wherefore it is ordered, that the judgment of the District Court be set aside and annulled; that the judgment be reinstated on the docket, and that the District Court be ordered to proceed in the premises, according to law, and agreeably to the principles laid down, in the case of *The State v. Jones*, referred to above.

Preston, Attorney General, for the State, appellant.

A. N. and *O. N. Ogden*, for the prisoner.

THE STATE v. LEONARD COLLINS HORNSBY.

To render a plea of a former acquittal a bar, it must be a legal acquittal, by judgment upon trial, for substantially the same offence, by a verdict of a petit jury. New trials may be granted in capital cases, as well as in prosecutions for misdemeanors, where justice and humanity demand it.

The effect of a new trial in a criminal prosecution is merely to grant a re-hearing of the case before another jury, with as little prejudice to either party as if it had never been heard before. No advantage is to be taken of the former verdict on the one side, nor of the order awarding a new trial on the other.

Where on an indictment for murder, the jury find the prisoner guilty of manslaughter, and a new trial is awarded to the latter, the prosecuting attorney may enter a *nolle prosequi* as to the charge of murder, and prefer a new indictment for manslaughter, without thereby acquitting the prisoner of the last offence. But the verdict of manslaughter is a virtual acquittal of the charge of murder, for which the prisoner cannot be again tried.

A *nolle prosequi* amounts neither to an acquittal nor pardon. It is simply the discharge of the particular indictment as to which it is entered, and is no bar to a future indictment for the same offence.

At any time before a jury is empanelled, the prosecuting attorney may enter a *nolle prosequi*, without the consent of the court or of the accused; but where the jury has been charged with the trial of a case, this right cannot be exercised against

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the will of the court, which will not consent to its exercise where the defence appears ample, or the motion not likely to promote the ends of justice. The right of appeal arises in a criminal case only after verdict, judgment and sentence. Any appeal taken previously will be dismissed, on a motion to that effect.

APPEAL from the Criminal Court of the First District, *Cannonge, J.*

Preston, Attorney General, for the State.

Collens and *Preaux*, for the appellants, cited 2 Hale, 181, 220, 243, 249, 250, 251, 294-6. 2 Hawk. ch. 35, ss. 8, 9, 10; ch. 36, ss. 1, 10, 14; ch. 47, s. 12, n. 13 East's Rep. 416. 6 Term Rep. 638. 1 Chitty, 654. Starkie's Crim. Plead. 397. 4 Barn. & Adolph. 275. 18 Johns. 187. 6 Serg. & Rawle, 577. 1 Devereux, 491. 1 Haywood, 241. 8 Wendell, 549. 1 McLean, 432.

Soulé, on the same side.

JOHNSON, J. On the 7th of March, 1844, the defendant was indicted for the crime of murder, and found guilty of manslaughter. His counsel moved in arrest of judgment and for a new trial, on various grounds, which were overruled by the judge of the criminal court, and an appeal was prosecuted to this court. On the hearing here, a new trial, for irregularities in the proceedings below, was ordered and the case remanded for that purpose. *Ante*, p. 554.

On the 21st of November, 1844, the attorney general preferred a new indictment against the accused for manslaughter, and on the same day, with leave of the court, on motion, a *nolle prosequi* was entered upon the indictment for murder. On the 16th of December, 1844, the accused having been brought to the bar for an arraignment on this new indictment, interposed the following plea, to wit:

"The accused, Leonard C. Hornsby, being arraigned on the indictment charging him with the manslaughter of Daniel H. Twogood, pleads *auterfoits acquit*; and also pleads, that he has heretofore, on a former indictment, been put in jeopardy of life and limb for the same offence herein charged, and that this prosecution is thereby barred and should be abated, agreeably to the principles of the constitution of the United States, and of the government and laws of Louisiana.

"And this defendant further shows, that on the 7th day of March, 1844, an indictment in legal form and valid in law, was filed against him in the court, charging the defendant with the murder of said Daniel H. Twogood; that this defendant was arraigned thereon on the 12th day of March, A. D. 1844, and having pleaded 'not guilty,' was tried thereon, and at the termination of the said trial, on the 22d day of March, 1844, the jury

sworn in said case, returned a verdict as follows: 'Guilty of manslaughter, New Orleans, 22d March, 1844, Francis L. Crais, foreman,' upon which, sentence and judgment were passed upon this defendant, on the 20th day of June, 1844, condemning this defendant to five years imprisonment at hard labor, to pay a fine of fifty dollars and the costs of the prosecution; that upon appeal from said judgment and sentence before the Court of Errors and Appeals in criminal matters, the said judgment and sentence were, on the 11th day of July, 1844, set aside, cancelled and annulled, and the case remanded for a new trial; that, on the 21st day of November, 1844, a *nolle prosequi* was entered upon said indictment for murder, on motion of the attorney general, which motion was allowed by the court. And this defendant for greater certainty, annexes hereunto, as a part of this plea and answer, a certified copy of the said previous plea and answer, and a certified copy of the said previous indictment for the murder of Daniel H. Twogood, in order that its identity with the present prosecution, may fully and clearly appear, and in order that the court may see with greater certainty that this defendant is actually charged with the same offence charged in said indictment for murder.

"That this defendant will show from the records of this court, and of the said Court of Appeals;

"1st. That the proceedings above alleged, amount in law and equity, to an acquittal of the crime herein alleged.

"2d. That said proceedings are a perpetual bar to the present prosecution."

To this plea the attorney general demurred, alleging for cause, that the facts set forth in said plea, are insufficient in point of law to substantiate said plea and bar the present prosecution; on which he prayed the judgment of the court—that said plea of *autrefois acquit* be overruled and rejected, and the defendant tried on the indictment found against him.

Subsequently the defendant filed the following additional pleas, to wit: "In this case the defendant, for greater certainty and without waiving any of the exceptions contained in his pleas to the indictment in this case, sets forth, that he relies upon the following points comprehended in said pleas:

"1st. Upon the verdict rendered to the jury on the former indictment, and recited in this defendant's plea and answer.

"2d. Upon the 5th article of the amendments to the constitution of the United States, which declares that 'no person shall be subject for the same offence, to be twice put in jeopardy of life or limb,' said article being of binding force upon the courts of this and the other States of the Union.

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"3d. Upon the 33d section of the acts of the Territorial Legislature, approved May the 4th, 1805."

Under the mixed aspect of these pleas, the necessity is imposed on us, to consider what is no longer a novelty but a very plain matter, and that is the legal import of the term *auterfoits acquit*. It is a plea made by a defendant indicted for a crime or misdemeanor, that he has been formerly tried and acquitted of the same offence. *To be a bar* the *acquittal* must have been *by trial*, and by the *verdict of a jury*, on a valid indictment. 1 Bouvier, 109. To render the plea of a *former acquittal* a bar, it must be a *legal acquittal* by judgment upon trial, by a verdict of a petit jury. 1 Chitty, 458.

These authorities prove clearly, that a *legal acquittal* by judgment, upon trial, by verdict of a petit jury, must be shown, to sustain the plea of *auterfoits acquit*, and bar the proceedings.

The argument for the accused did not appear directly to question the truth of this doctrine, nor was a technical defence of *auterfoits acquit* in so many words, insisted upon; but it was urged, that the new trial granted in the case of murder wherein a verdict for manslaughter had been rendered, and the subsequent quashing of the indictment for murder, amount in judgment of law, to an acquittal. In taking this ground, the opinion of Judge Story, in 2 Sumner's Rep. 37, seems chiefly to have been relied on. It is there asserted, that a new trial cannot be granted in a capital case, because it would operate an acquittal of the accused, upon the common law maxim and constitutional provision that, "no person shall be subject for the same offence to be twice put in jeopardy of life and limb," which is now well understood to mean no more than that a man shall not be tried twice for the same offence.

In England, there is no doubt, in case of treason or felony, that a new trial cannot be granted when the proceedings have been regular; but if the conviction appears to be unjust to the judge, he may respite the execution, to enable the defendant to apply for a pardon, but this court has decided, in consonance, as it thinks, with the great current of American decisions, that all judges who are empowered to hear and determine indictments for crime, are invested with a discretionary power to grant new trials in capital cases as well as in those of misdemeanor, where, upon a sufficient showing, touching the merits or irregularities in the proceedings, justice and humanity demand it.

In the case of *The State v. Hornsby*, ante, p. 544, we recognized this merciful principle, when, in awarding him a new trial, we decreed that, "in capital cases, upon a separation of the jury, misconduct and abuse will always be presumed." We cannot, therefore, in this instance, give to the opinion of Judge Story,

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however eminent as a jurist he may be, the weight of authority. In the case in which it was delivered, it did not acquire the force of authority, since the other judge, (Davis,) differed in opinion with Judge Story on the point; and we are yet to be informed whether it has succeeded in making many converts any where. The learned reasoning of Judge Story led the prisoners on to execution upon the gallows, to prevent their lives from being twice put in jeopardy, thus torturing a humane constitutional provision in their favor, into one of hopeless and inevitable death, no matter how unjust and grievous the sentence of conviction. In the case of *The Commonwealth v. Green*, 17 Mass. Rep. 515, 533, Judge Parker said, "the court had authority to grant a new trial after conviction of a capital crime." In 1 Johnson's Cases, 104, *The People v. Townsend*, a new trial was granted, in a case of perjury, because the verdict of the jury was contrary to evidence. See also the same principle acknowledged in *The People v. McKay*, 18 Johnson's Rep. 21. Indeed we do not regard this question as at all open to controversy, and have given to it more consideration than it merited, and more, it may be, than was expected of us. We have, therefore, no doubt of our authority to grant, and of the defendant's right to demand, the new trial which was awarded him on the former appeal. Let us now inquire into the legal effect of that new trial, in view both of the rights of the accused and those of the State. What is a new trial? "It is a re-hearing of the case before another jury; but with as little prejudice to either party as if it had never been heard before. No advantage is to be taken of the former verdict on the one side, or the rule of court, for awarding such second trial on the other." Blackstone, 3d vol. p. 391. A new trial results then, in placing the case exactly in the position it occupied before there had been a trial, in relation to the objects for which it had been awarded, and, with this qualification, all proceedings are set aside, and the party stands as if he had never been tried; and when this court, on the former appeal, ordered, that "the judgment of the criminal court be set aside, cancelled and reversed," the defendant stood again before that court as he stood before the trial—unprejudiced and in the full possession of all his rights, just as they existed when he first answered to the indictment. But the new trial conferred on him no *new rights*.

It is not disputed that the new trial was awarded at the prayer of the defendant, and, as we think, in accordance with settled doctrine; yet it has been argued that, in seeking and obtaining the new trial, the defendant did not, by legal intendment, consent to be tried on any other than the first indictment, the quashing of which, under the circumstances, was, it is said, equivalent to an acquittal. Upon the maturest reflection, we think that no such

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pretension can be legitimately set up by the defendant. He took the new trial with all its legal consequences and contingencies; and if the attorney general, anterior to the first trial or to the empannelling of a jury for the purpose of a trial, could have entered, as we doubt not he could, a *nolle prosequi* on the indictment which was then pending for murder, and institute another instantly for manslaughter, without thereby acquitting the accused by judgment of law, he certainly had an equal right to adopt that course after the new trial was awarded, at the time he did exercise it with the leave of the court. All former proceedings were set aside, and the party stood as if he had not been tried at all. It is true, the verdict of manslaughter was a virtual acquittal of the charge of murder, for which grade of homicide the accused could not have been again constitutionally put on his trial under the first indictment or a second; yet it would be a legal solecism to say he was acquitted of the manslaughter, when he was convicted of that offence by the finding of the jury, which was an insuperable barrier to a verdict for murder only, on a second trial—the new trial having been granted in reference to the fact whether the homicide was manslaughter or not. In other words, the new trial was granted as to the crime of which the accused was found guilty, the indictment affording only the form of bringing the crime before the court. The homicide was always the same in fact. It was pronounced manslaughter by the jury. The accused succeeded in setting that verdict aside, to be tried again for the same fact. It was the fact, and not the form of bringing it before the court, which the accused succeeded in having ordered to be tried again, and the fact is now brought before the court in a form most favorable to the accused. It is a rule of law, that if a man indicted for murder is found guilty of manslaughter, he cannot again be indicted for murder, if the first indictment were a good one; and if, in such a case, a new trial is awarded, it may be on the indictment for murder, because an indictment for murder includes an accusation of manslaughter. We can see, however, no legal reason, why, in a case like the present, the attorney general might not enter a *nolle prosequi* on the indictment for murder, on the trial of which, manslaughter was the verdict, and a new trial granted, and prefer one simultaneously for the manslaughter. It neither compromises, delays, nor takes away from the accused, any right or privilege, whilst it simplifies the prosecution.

These matters disposed of in this manner, we are to inquire into the effect of the *nolle prosequi*, and of the right of the attorney general to enter it in this case. The effect of a *nolle prosequi*, when obtained is to put the defendant without day; but it does not at all operate as an acquittal, for he may afterwards be re-indicted, and, even upon the same indictment, fresh process

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may be awarded. 1 Chitty, 470, 480. A *nolle prosequi* neither amounts to an acquittal nor to a pardon, but is simply a discharge of a particular indictment upon which it is entered, and is no bar to a future indictment for the same offence. 2 Mass. 172. 7 Pick. 179.

A *nolle prosequi* is now held to be no bar to a future action for the same cause. 2 Bouvier, 103. To this point, these authorities we think ample. Now as to the right of the attorney general to enter a *nolle prosequi*, as to the indictment for murder, and to prefer the one for manslaughter. After much investigation in the case of *The State v. Brown*, decided by this court, *ante*, p. 566, we held that, "the attorney general may at any time before a defendant has been actually tried, on application to the court, have an indictment quashed, if the prosecution is in good faith, and not instituted from malicious motives, or for the purposes of oppression; and that the presiding judge will take care to prevent abuse and oppression, by not permitting a capricious, arbitrary or malicious exercise of the power." Upon a view of all the authorities bearing upon this question, we are satisfied, that at all stages of a criminal prosecution before a jury is empanelled, the attorney general possesses an arbitrary control over his indictments, and that he may enter a *nolle prosequi* as to them, at pleasure, without the consent of the court or of the accused, and not run counter to the fifth article of the amendments to the constitution of the United States. But when the jury has been charged with the trial of a case, this right of the attorney general is suspended, or at least qualified, and cannot be exercised *against* the consent of the court, which will in no case grant it, if the defence appears ample, or if the motion appears not to be in good faith, and to promote the ends of justice. This right may be exercised, even after conviction, when it is clear that no judgment can be pronounced on the verdict, on account of defects in the indictment. But whether this power, even with the permission of the court, can be exerted, without working an acquittal of the accused, after the jury empanelled to try have received the charge of the court, and retired to consider of their verdict, it is unimportant here to inquire; because, as has been said, the *nolle prosequi* in this case was entered at a time when the attorney general needed not even the consent of the court or the accused to justify it; that is to say, before the accused had been put on his trial, after the granting of the new trial, which placed the case as to the fact of manslaughter precisely where it was before there had been any trial at all. We conclude, therefore, that the attorney general had a right, in this instance, to enter the *nolle prosequi* upon the indictment for murder, and bring one forward for manslaughter; and that the action of the court and of the attorney general was in good faith and not unfavorable to any right of the accused,

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who cannot, in consequence thereof, claim to have been acquitted in fact or in law.

No objection was raised by the State to the right of the accused to bring this appeal from a preliminary decision or interlocutory decree of the criminal court, and we have considered the merits of the case as though such right existed; but it is not, therefore, to be concluded that we mean to sanction such a practice. On the contrary, we do not think that an appeal would lie in the case, as the right accrues only after verdict and judgment and sentence; and, if the attorney general had made a motion to dismiss the appeal, we should have felt bound to sustain it.

The judgment of the Criminal Court overruling the prisoner's pleas in bar is affirmed, and it is ordered, that the case be remanded to be proceeded in according to law.

THE STATE v. SAMUEL KENNEDY.

A new trial will not be granted, in a prosecution for murder, on the ground of the jury having been permitted to communicate with persons not members of their body, where they were kept together in apartments provided for their use during the adjournment of the court, and the few words exchanged by the jurors with persons not of their body, were with sworn officers of the court, brought unavoidably in contact with them, and did not relate to the trial, nor were of a character to produce the slightest effect upon their decision.

Where a jury in a criminal case is put in charge of a sheriff or his deputy, it is not necessary that either should be specially sworn to keep them together, and not to speak to them except to ask them if they are agreed, nor to permit others to speak to them. The duty of the sheriff, or his deputy, in such a case is an official one, which they having been already sworn to perform, no additional oath was necessary.

Where on a trial for murder, a person offered to be sworn as a juror answers on his *voir dire*, that he has conscientious scruples against finding a verdict of guilty in any case involving the life of the accused, he may, on the principles of the common law, independently of any statutory enactment, be set aside for cause.

Where twelve months have not elapsed between the time when a juror first determined to fix his residence in this State, and the date of the formation of the *venire*, he is incompetent, not having resided twelve months within the State, as required by law. The twelve months commence only from the date of the determination to reside within the State, though the party may have been within it for many months previously.

An objection to a juror on account of want of residence should be made when the juror is offered to be sworn. Where no inquiry is made of the juror on his *voir dire*, as to his residence, any objection on that account will be too late on a motion for a new trial. *Aliter*, when, on being interrogated, he states that he possesses any qualification, and the statement is afterwards found to be false.

In applications for a new trial in criminal cases, on the ground of newly discovered evidence, it must be shown that there has been reasonable diligence to procure the evidence, that it has been discovered since the trial and is material, and that it would probably produce a different verdict, if a new trial be granted.

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It is not necessary, either in England or in this State, to mention in an indictment the name of the court in which it was found; consequently, where the style of the court is inaccurately given in the commencement and statement of an indictment, it will be disregarded as surplusage.

The caption forms no part of an indictment. It is a separate act, not submitted to nor acted on by the grand jury, preferring no charge against the accused, and never appears on the record till the bill has been found, and generally not until the indictment has been removed for trial to a higher tribunal, by writ of error or *certiorari*. Its principal object is to show that the inferior tribunal had jurisdiction of the offence, and owes its origin to the peculiar organization of the English courts. In this State, where the same court before which an indictment is found must try it, no caption is necessary or required.

In an indictment the venue, that-is, the parish in which the offence was committed, must be stated, in order that the court may know whether it has jurisdiction.

In indictments for offences termed felonies at common law, the time when the offence was committed must be stated with such certainty that no doubt can be entertained of the period really intended. Any uncertainty in the averment of time and place will vitiate the indictment. This averment must be repeated as to every issuable fact; when they have been once set forth with certainty, they may, in every subsequent averment, be referred to by the words *then* and *there*, which are equivalent to a repetition of the time and place.

In an indictment for murder, the material facts are the mortal stroke and consequent death, and the death must appear to have occurred within a year and a day after the mortal stroke. The averment of each of these material facts must be accompanied by an allegation of a certain time and place: thus, where an indictment for murder, after stating the mortal blow, with the usual averments of time and place, proceeds: "Of which mortal wound so given by the said K. with the deadly weapon aforesaid, to the said W., the said W. did then and there suffer and languish and languishing did live, and, a few hours after did die of the said mortal wound," the averment of the time and place of the death is insufficient; and the defect is not cured by a verdict. *Per Curiam*: The words "*then* and *there*" immediately precede and refer to the words "languished and languishing did live" and not to the allegation "and a few hours after did die." The copulative *and* is insufficient to connect the time and place with the death. The facts of time and place must be precisely and distinctly stated; they cannot be inferred. Nor will the averment in the conclusion of a correct time and place of death, cure this defect; on the contrary, it will render it repugnant to the statement.

The stat. of 4 May, 1845, s. 33, which provides that "the forms of indictments (divested, however, of unnecessary prolixity,) the method of trial, rules of evidence and all other proceedings whatsoever in the prosecution of said crimes, offences and misdemeanors, changing what ought to be changed, shall be, except as otherwise provided for, according to the common law," did not intend to confer upon the courts authority to legislate on the subject of criminal proceedings or the framing of indictments, but merely to direct prosecuting officers to omit those prolixities acknowledged to be such at common law, and unnecessary, though habitually inserted in indictments; and the changes directed to be made, are those necessary to make our proceedings conform to our own laws and form of government. Whatever has been determined to be an essential averment in an indictment at common law will be deemed necessary here, unless a statute of the State has removed the reason, and with it the necessity for the allegation.

APPEAL from the Criminal Court of the First District, *Canonge, J.*

Preston, Attorney General, for the State.

R. Hunt, and *Grymes*, for the appellants.

The opinion of a majority of the court was pronounced by

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KING, J. The defendant Kennedy, was indicted before the Criminal Court of the First District for the murder of Benjamin Wood Wait, alleged to have been committed in the parish of New Orleans. Upon trial he was convicted, and having in the court below made ineffectual motions for a new trial and in arrest of judgment, he has sought relief by an appeal to this court.

The conclusion at which we have arrived, would warrant us in passing in silence over most of the grounds relied upon by the appellant in support of his motions. Pursuing, however, the practice which we hitherto observed, of disposing of all the questions submitted to our consideration in each case, we will proceed to examine those presented upon this appeal.

The first ground upon which the defendant asks for a new trial is, that after the jurors were empanelled and sworn to try the cause, they were permitted to have free communication with other persons than the sheriff's officer.

The facts in relation to this alleged irregularity are, that at nine o'clock in the evening of the first day of the trial, it was found that the investigation could not be concluded at that sitting, and the court was adjourned until the following morning. The jury were delivered to an officer, with instructions not to speak to them himself, nor to permit others to speak to them concerning the matter then under examination. The judge also advised the jury to abstain from conversations among themselves about the case, as the evidence had been only partially heard, and their opinions should be held suspended until the whole testimony came before them. The jury spent the night in the court room, and clerk's office, adjoining apartment in the same building, where refreshments were provided for them. The clerk and his deputy were compelled to remain in these rooms after the adjournment, in order to make up the record of the day's proceedings, there being no other apartment to which they could repair for that purpose, and obtained a special permission from the judge to that effect. The clerk, when about to depart, said to one of the jurors "There take my cloak," and left the room saying nothing more.

Mr. Clement Blaney, the deputy clerk, left his office, and passed through the court room at the moment that the jury were supping, and, was invited by several of them to join in their meal. He declined the invitation, but took a glass of wine, spoke a few moments with the sheriff, and withdrew without saying a word about the matter then pending before the jury. Fabre, the officer of the court into whose charge the jury were delivered, and Labnut a deputy, who was present to assist him in the discharge of his duties, supped with the jury but neither spoke to them themselves, nor permitted others to speak to them in relation to the

trial. These are the facts which constitute the alleged fatal irregularity.

We said in the case of *The State v. Hornsby*, decided at a former term of this court, *ante*, 554, that, in capital cases, when the jury were permitted to separate during the progress of the trial, misconduct would be presumed; and this upon the ground, that in promiscuous intercourse with their fellow citizens, their minds were necessarily exposed to be influenced, and to receive impressions of which they themselves might perhaps not at the time be conscious; and that it would be impossible to establish the fact by evidence. But this presumption does not arise where the jurors have been kept together. The reason of the rule then ceases. Measures are thus taken to prevent misconduct, and the means provided for ascertaining, and for establishing by proof, the precise nature and character of their irregularities, from which courts may determine whether the tendency of the acts has been to influence the verdict.

Every irregularity will not vitiate a verdict, but those only which are calculated to produce an impression upon the minds of jurors, and influence the verdict which they are to render, (2 Summer, 83;) and courts will satisfy themselves that such has been the tendency of the acts complained of, before new trials will be granted on the ground of misconduct on the part of the jury.

In the present instance, the few words exchanged by the jurors with persons not of their body have been detailed. The conversations were held with some officers of the court, brought unavoidably in contact with them, did not relate to the trial, and were not of a character to produce the slightest effect upon the decision of the jury.

The next ground urged is, that the bailiff into whose charge the jury was delivered was not sworn, "to keep them together and to permit none to speak to them, nor to speak to them himself, but only to ask them, whether they are agreed."

Hale says, that when the jurors depart from the bar, a bailiff ought to be sworn to keep them together, and not to suffer any to speak with them. 2 Hale, 396. This formality appears to be observed at all common law trials, and the books which treat of those proceedings generally concur in stating, that the oath ought to be administered, but do not assert that it is essential to the validity of a verdict; nor have we been referred to any adjudicated case where the omission was held to be fatal.

The sheriff and his deputies, before entering upon the duties of their offices, are required, by our constitution and laws, to take an oath, faithfully and impartially to perform the duties incumbent

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upon them. The duties of keeping the jury together, in such cases, and of not permitting them to speak with any one, is one of those imposed by law upon these officers, when juries are delivered into their charge, and of course are of those which they have already been sworn to perform. No additional oath would, therefore, seem to be necessary for the execution of this specific service, unless it might be to remind the officer of his duty. This was done by the judge, who gave special instructions to the deputy sheriff, into whose charge the jury was delivered, as to the nature of his duties; and the latter appears to have executed them as strictly as though the oath contended for had been administered. The object in view was to prevent misconduct on the part of the jury, and this was attained.

By our laws, this form has been dispensed with in civil proceedings, and the practice in criminal prosecutions appears generally to have fallen into disuse in this State. It may be doubted whether our courts have the right to exact such an oath from a bailiff. The act of 1815, after prescribing the form of the oath to be administered to all officers in this State, in the sixth section provides: "that from and after the passing of this act, all other oaths of office shall be, and they are hereby, repealed." Bullard & Curry's Dig. 611. We do not think that the oath is necessary here.

The next cause assigned for a new trial is, that the judge erred in permitting two jurors to be challenged by the Attorney General for cause, because they were conscientiously opposed to capital punishment.

Two persons being called as jurors, and sworn upon their *voir dire*, were asked by the attorney general, "whether they had any conscientious and religious scruples against finding a verdict of guilty, in any case involving the life of the accused?" The question was answered affirmatively, and the jurors set aside for cause.

It is contended, that no such ground of recusation is known to the common law, or to the statutes of this State, and that the decisions of courts in other States recognizing the validity of this objection to jurors have been based upon special legislative enactments.

Our statute merely declares the qualifications of condition, age, sanity, residence and property, which the citizen must possess before he can be drawn and summoned as a juror, leaving the court or triors, as the case may be, subsequently to determine, upon inquiry, when he is presented to the prisoner, whether his mind is free from anger, influence or prejudice.

"The rule of the common law is, that the juror must stand indifferent as he stands unsworn." Co. Litt. 155, a. He cannot

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be said to stand indifferent between the State and the accused, upon a trial for a capital crime, when, from his religious belief and conscientious scruples he cannot convict, and is therefore previously determined to acquit. No adjudicated case upon this point is found in the common law reports, probably because opinions opposed to capital punishments do not prevail in England. But an English judge would not hesitate, in a capital case, to reject jurors professing such opinions, upon the common law principle, that they did not stand indifferent, that they were not above all exception, and those by whom the truth of the matter in controversy could be best ascertained. 1 Chitty, C. L. 544. Bacon's Abridgment, *Juries*, G. 5.

A similar question arose in New York, growing out of a statute relating to persons who belonged to religious denominations opposed to the infliction of capital punishment. Mr. Chief Justice Savage, speaking of a juror who entertained the same opinion, but was not a member of a religious denomination, said, "such a person is unfit; he has prejudged the question; he has made up his verdict without hearing the evidence, and ought to be excluded upon common law principles. It would be a solemn mockery to go through the forms of a trial with such a jury, or even with one such juror. The prisoner is sure to be acquitted independent of the question of guilt or innocence. It would be a misnomer to call such a proceeding a trial." 13 Wendell, 354, 355.

In the case of *The United States v. Cornell*, Mr. Justice Story in sustaining an objection made to a juror upon very similar grounds, says; "To compel a quaker to sit as a juror in such cases, is to compel him to decide against his conscience, or to commit a solemn perjury. Each of these alternatives is equally repugnant to common sense. To insist on a juror's sitting in a cause where he acknowledges himself to be under influences, no matter whether they arise from prejudices or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt the proceedings of courts of justice. We do not sit here to procure the verdicts of partial and prejudiced men, but of men honest and indifferent in causes." 2 Mason's Rep. 105.

In Pennsylvania the question was similarly decided, exclusively upon common law principles; (17 Serjeant & Rawle, 155;) and upon those principles we think this objection to a juror a good one in this State.

The next position taken is, that one of the jurors had not resided in the State for twelve months previous to the formation of the *venire*. This person came to the city of New Orleans, on the 4th

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of November, 1843. He was at that time a partner in a commercial house here, and remained here, engaged in business as a member of the firm, until the 17th June, 1844, when he returned to New York upon business, and to see his family, and was absent until the 23d September, 1844. When he first came, it was with the intention of establishing himself in mercantile business. Some three or four months after his arrival, he for the first time, made up his mind to bring his family to this city, and reside here permanently. His intention of fixing his residence in this State was, therefore, not formed until about the 4th March, 1844. The *venire* upon which he was summoned was formed about the end of February, 1845.

Our act requires a residence of twelve months previous to the formation of a *venire* as one of the qualifications of a juror. The juror had not acquired this residence, and therefore could not have been legally drawn or presented to the accused. 2 Robinson, 266. The want of residence is not an exception which the juror alone can plead, but a defect of which the accused may, at the proper time, avail himself. The law requires this term of residence in order that the juror may acquaint himself with the laws and institutions of the State, and incorporate and identify himself with its people, before he shall be permitted to sit in judgment upon their lives and property. The objection however comes too late. It should have been made when the juror was offered to the accused. 1 Chitty, 545, 546.

An opportunity is then afforded to the prisoner of inquiring into the qualifications of the juror upon the *voir dire* examination. If, upon that inquiry, he be found to want the legal qualification, he may be set aside for that cause. It would have been different if the juror, when interrogated, had stated that he had acquired the requisite residence, was free from bias, or that he possessed any other legal qualification, and it had subsequently been discovered that the statement was false. This would have been a fraud practiced upon the accused, from which he could have been relieved. Having waived the right accorded to him by law, he waived with it every objection which he might have urged to the juror. Lord Ellenborough said, that a different rule might vitiate one-half of the verdicts rendered at every assizes in England. The same remark is applicable here. 2 Bay's Rep. 155. Graham on New Trials. 1 Chitty, 545, 546, and the authorities there quoted.

The next ground relied upon is, that new and material evidence has been discovered since the trial. In applications for new trials upon this ground, it should not only be made to appear, that there has been reasonable diligence, that the evidence has been discovered since the trial, and is material, *but that it is*

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not cumulative, and would probably produce a different verdict if a new trial were granted. This principle seems to be well settled.

In the cases of *The State v. Clark*, and of *The State v. Hornsby*, decided at former terms of this court, *ante*, pp. 533, 554, it was held, that "it is not sufficient to warrant the granting of a new trial, that the newly discovered evidence might have the effect of throwing a shade of doubt over some of the incidental circumstances of the trial. It should appear to be of so decided a character that, if admitted, it would give to it an acquitting complexion."

From such of the facts as can be gathered from the record, we are not prepared to say, that the new discovered evidence is such as ought to have produced a different result, if it had been submitted to the jury, even if the credibility of the new witnesses were entirely free from suspicion. The record discloses the additional fact, that the newly discovered witness has, on a former occasion, been convicted of forgery in this city, and that, at the time of making this application, he was confined in one of the prisons of this parish under a similar accusation preferred against him. We think the court properly refused the new trial.

We will now proceed to examine the several grounds upon which an arrest of judgment has been claimed.

The first of these is, that "the indictment does not correctly express the name of the court where the indictment was found, but erroneously styles it the *Criminal Court of the First Judicial District*, when the act of 1821 declares the court shall be known and called the *Criminal Court of the First District*; that a court is only known and properly designated by the name and style prescribed by law; that the name of the court where the presentment is made must be expressed; and that an erroneous statement or description of the court, of its name, style, or title to authority is fatal."

The better to understand the nature of the alleged error it will be necessary to transcribe that part of the indictment in which it is supposed to occur. It is as follows;—

"The State of Louisiana, Criminal Court of the First Judicial District, parish of New Orleans:

"The grand jurors of the State of Louisiana duly empanelled and sworn for the parishes of Jefferson, Orleans and Plaquemines, upon their oath present, that one Samuel Kennedy, late of the city of New Orleans, on the 29th day of December, in the year of our Lord one thousand eight hundred and forty-four, at the said city of New Orleans, in the parish of Orleans, and within the jurisdiction of the Criminal Court of the First Judicial District, did" &c.

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It will be perceived that the alleged vices occur in the *commencement and statement* of the indictment.

It is manifest that the name of the court differs in the indictment from that given to it in the legislative act, which is "*Criminal Court for the First District.*" Bul. & Curry's Dig. 193.

Admitting for present purposes, that the variance is material, and would be fatal in a *caption*, we will proceed to inquire if it be necessary in this State, to describe in any part of an indictment the court in which it was found.

At common law, the only source to which we can refer for the principles upon which the decision of the question depends, the commencement of every indictment is thus: "Middlesex, to wit: The jurors of our Lord the King, upon their oath present, that" &c. and this is what is technically termed the commencement, after which follows the statement of the offence.

Indictments in England neither describe the court before which they are found, nor the jurors by whom they are found, nor do they aver that the court has jurisdiction of the offence. The numerous authorities to which we have been referred in support of the position that the court is to be set forth in the *indictment*, all concur in stating, that it is to be described in the *caption* and with great precision, but none, that the description is ever given in the indictment itself.

Now the caption is not to be confounded with the *commencement*, nor with any other part of an *indictment*. It forms no part of that instrument, but is a wholly separate and independent act, which is not submitted to, nor acted upon by the grand jury, prefers no charge against the accused, and never figures upon the record until after the bill has been found, and, in general, not until the indictment is removed for trial to a higher tribunal, by a writ of error or of *certiorari*.

In England, when in obedience to one of these writs, an indictment is removed from an inferior to a superior court, it is accompanied by a history of the previous proceedings, describing the court before which it was found, the time and place where it was found, and the jurors by whom it was found. This is properly the return to the writ, from which is extracted the caption which is prefixed to the indictment in the record. Its principal object is to show, that the inferior tribunal had jurisdiction of the offence, and thence arises the necessity for the great precision required in that respect. 2 Hale, 165, 166. Chitty's C. P. 326, 327, 328. Starkie, C. P. 258. Archbold, C. P. 24.

Captions owe their origin to the peculiar organization of the English courts, some of which, with *limited* jurisdiction, and not unfrequently acting under *special commissions*, may take indictments. These indictments may be removed to the Court

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of King's Bench for trial. That court will require, before examining the charge, a history of the previous proceedings, and to be specially informed of the authority of the inferior court to take the indictment; for, if the inferior court transcend its authority, the whole proceedings will be null, and the indictment quashed.

There is nothing analogous to this in our judicial system. We have but one class of courts for the trial of criminal accusations preferred against free persons, viz. the Criminal Court of the First District, and the District Courts; upon these, exclusive and unlimited original jurisdiction has been conferred. Indictments can be found and tried only before them, and cannot be removed from one to another of them. When an indictment sets forth the parish or venue where the offence has been committed, the law fixes the only court which has jurisdiction of it. The same court before which the indictment was found must try it. Hence there is, in this changed condition of things, no necessity for a caption to the indictment in this State. The court which has itself taken the indictment cannot desire to be informed by what authority it was acting, nor can it desire a formal statement of proceedings, all of which have passed under its own eye, and form a part of its own records.

The error in the position assumed by the defendant has been, in insisting upon a correct averment in the indictment of a fact, which the strictness of common law proceedings only required to be stated in the caption, when a caption became necessary. We find that, at common law, the designation in an indictment of the court before which it was found, is not required. Under our system, the necessity for a caption can never arise; and it has, therefore, been in practice discarded. It follows as a consequence, that it is not necessary to make the averment in any part of our criminal proceedings. Those parts of the indictment under consideration, which are in the following words; "The Criminal Court of the First Judicial District," are surplusage, and, as such, may be rejected without injuring the remainder of the instrument.

It is necessary to state the venue, that is, the parish in which the offence was committed, that the court may know that it has jurisdiction. In the present instance, the venue has been distinctly expressed in the commencement; and, in the statement, the crime is alleged to have been committed in the parish of Orleans.

The next objection made to the indictment is, that "It is defective in its statement. The allegations of the time and place of the death of the person murdered are material, and must be distinctly set forth in the indictment. It must appear that the party

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died within a year and a day. This indictment states neither time nor place of the death of the party killed, and is, therefore, fatal."

The indictment, after stating the mortal blow, with the usual averments of time and place, proceeds: "Of which mortal wound, so given by the said Samuel Kennedy, with the deadly weapon aforesaid, to the said Benjamin Wood Wait, the said Benjamin Wood Wait did then and there suffer and languish, and languishing did live, and a few hours after did die of the said mortal wound."

No principle appears to be better settled than that, in indictments for high offences, those termed felonies at common law, the averment of *time* and *place* is to be repeated to every issuable and triable fact. When these have been once set forth with certainty, they may, in every subsequent averment, be referred to by the words *then* and *there*, which are deemed equivalent to a repetition of the time and place. The time should be stated with such certainty, that no doubt can be entertained of the period really intended; and such is the precision required in this respect, that any uncertainty in the averment of time and place will vitiate the indictment.

The material facts in murder are the mortal stroke, and the consequent death, and the death must appear upon the record to have occurred within a year and day from the time when the mortal stroke was given. The averment, then, of each of these material facts must, under the well established rules of criminal pleading, be accompanied by an allegation of a certain time and place. Thus, to aver that the assault was made on two days, as on the first and second of May, or on an impossible day, is such an uncertainty as will vitiate the indictment.

If an indictment for murder state that A, at a given time and place, having a sword in his right hand, did strike B., it is bad, for the time and place relate to the having the sword, and it is not stated when or where the stroke was given.

A., at a certain time and place, made an assault upon B., *et eum cum gladio percussit*, was held to be bad, because it was not said *adtunc et ibidem percussit*. The copulative conjunction "*and*," without the repetition of the time and place to this material ingredient of the offence, being deemed insufficient. In misdemeanors the same strictness is not required. 1 Chitty, 218, 219. Starkie, Cr. Pl. 58, 62, 65. 2 Hale, 178. Archbold, Cr. Pl. 34. 2 Hawk. cap. 23, sec. 88.

We will not further multiply instances of this precision, required in the averment of time and place to every material fact in capital crimes. The books are full of them, and no principle is better settled. The decision of the question depends altogether

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upon authority, and the language of the authors cited, upon this as upon other points, has been used as nearly as possible.

Testing the indictment under consideration by these well established rules we find, that although there is a sufficient certainty in setting forth the time and place of the mortal stroke, yet there is no averment of the time and place of the death. The *then* and *there* immediately precede and refer to the "languished, and languishing did live," and not to the allegation, "and a few hours after did die." The copulative *and*, it has been seen, is insufficient to connect the time and place with the death. Nor will the grammatical construction of the sentence support the position assumed in argument, that the *then* and *there* refer to the death. The facts of the time and place of death cannot be inferred or ascertained by intendment; they must be precisely and distinctly stated. Nor will the averment in the *conclusion* of a correct time and place of death, cure this defect, but, on the contrary, will render it repugnant to the statement. At the close of the indictment the legal conclusions are to be drawn from the facts previously set forth in the statement. The facts of the time and place of the death not having been set forth in the statement, the legal conclusion cannot be drawn, that the deceased was murdered in the parish of Orleans, on the 29th day of December, 1844.

The attorney general has called our attention to the statute of 1805, which directs that indictments, divested of all unnecessary prolixity, changing what ought to be changed, shall be according to the common law, and contends, that the frequent repetitions of time and place constitute some of the prolixities contemplated by the act, of which courts are authorized to divest indictments. We are not prepared to give this construction to the statute. We do not believe that the Legislature intended to confer upon courts authority to legislate upon the subject of criminal proceedings, or the framing of indictments, but merely to direct prosecuting officers to omit those prolixities which were acknowledged to be such at common law, and, consequently, unnecessary, although habitually inserted in indictments; such as the averment that the defendant "not having the fear of God before his eyes," &c., with many others needless to be enumerated, which are found in old precedents, and even in those of more modern date. The changes directed by the act, we think, are those which are necessary to make our proceedings conform to our own laws and form of government; as, for instance, instead of an indictment commencing; "Middlesex, to wit: The jurors of our Lord the King," it should begin; "The State of Louisiana, Parish of Orleans: The grand jurors of the State of Louisiana;" with many others of a like nature. If, however, this legislative authority

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was ever conferred upon courts, it has long since been withdrawn by the constitution.

Whatever has been determined to be an essential averment in an indictment at common law, will be deemed necessary here, unless a statute of the State has removed the reason, and with it the necessity for the allegation. At common law, we have seen, that the averment, with certainty, of time and place of the death have been held to be indispensable in indictments for murder, and for sufficient reasons. These reasons have not been removed by our statutes, but exist here in full force; for it is equally true here, as in England, that the death must have occurred within a year and a day from the time when the blow was given, to constitute murder, and that the right to a trial by a jury of the *vicinage* is secured to every citizen.

We find, then, that the indictment wants one of the averments essential to its validity at common law, and that the averment is equally necessary under our laws. The defect is not cured by the verdict, and the judgment must be arrested.

The attorney general has commented forcibly upon the regrets expressed by learned and able English judges, that the great niceties required in framing indictments offered too frequent opportunities for the escape of culprits, the tendency of which was rather the encouragement, than the suppression of crime. Lord Hale said, that the strictness required had grown to be a blemish and an inconvenience in the law. Similar opinions have since been expressed by Lord Kenyon and Lord Ellenborough. 1 Chitty, 170. But we are not informed that these learned judges ever felt themselves authorized to disregard the law, such as it was, or to dispense with the observance of those niceties, of whose existence they complained. Their remarks apply with full force to the criminal laws of this State; that the power to remedy the evil resides in the legislative branch of the government, and it is to be regretted that it has not already been exercised.

The English parliament attentive to the suggestions of its courts, has provided remedies for many of the inconveniences of the common law. The act, however, has been passed since 1805, and has no force in this State. Archbold. Stat. Geo. IV.

It is therefore ordered, that the judgment of the inferior court be reversed; that the verdict in the case be set aside, and the judgment thereon arrested.

NICHOLLS, J. dissenting. Constrained to differ upon a single point from the opinion which has just been delivered, it is a source of satisfaction that my dissent, if erroneous, will exercise

no influence over the fate of the accused, and that a new trial will be awarded him, though a sense of duty compells me to withhold my concurrence. In all particulars I conceive, that the law has been properly expounded in the opinion of the court, except in sustaining the exception to the statement of the indictment respecting *time* and *place*, of which I believe the court has taken an improper view.

The indictment, or that part of it which is considered objectionable, is in the following words: "Of which mortal wound, so given by the said Samuel Kennedy, with the deadly weapon aforesaid, to the said Benjamin Wood Wait, the said Benjamin Wood Wait did then and there suffer and languish, and languishing did live, and, a few hours after, did die of the said mortal wound." This averment is deemed by the court defective, as not sufficiently descriptive of *time* and *place*. It is of opinion that the copulative *and* is insufficient to connect the *time* and *place* with the death, and that the grammatical construction of the sentence, will not support the position assumed in the argument that the *then* and *there*, refer to the death. Unable to subscribe to this position, I would observe, that there exists an ellipsis in the sentence, which should be confined grammatically no more to the absence of the words *then* and *there*, than to others equally important, and which the most fastidious hypercritic must admit as essential to convey the intended meaning, in that particular which the court considers sufficiently lucid to sustain the indictment. To insert all the words which are left out in this sentence so as to convey the meaning which the court thinks satisfactory, it should read: "Of which mortal wound so given by the said Samuel Kennedy, with the deadly weapon, aforesaid, to the said Benjamin Wood Wait, the said Benjamin Wood Wait then, and there did suffer and languish, and languishing *then and there* *he the said Benjamin Wood Wait did live, and* a few hours after *he the said Benjamin Wood Wait did then and there die.*" Now all the words above which are italicised, are *understood*, and necessarily understood, to make the sentence grammatically correct, but which to avoid tautology, the genius of the language has rejected, unless it be conceded that the whole sentence is connected together by the copulative *and*, whose power for this purpose, is palpably as clear in the one case as in the other. Take the same liberty with the sentence by inserting the words *then* and *there* as understood, with reference to the death as is necessary to show that the man who languished and died, was Benjamin Wood Wait, (which fact is not stated in the indictment unless the name is thus understood, and which is justified and required by the grammatical and proper construction,) and

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the one averment is as distinctly made as the other ; so distinctly made that, it is impossible to mistake the one or the other. But if any lingering doubt should still remain as to the *place* where he died, it is abundantly made manifest, by a subsequent part of the indictment viz. : " And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that the said Samuel Kennedy, *on the day aforesaid, at the time and place aforesaid, and in the manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder,*" &c. Here it is averred (if any doubt remained,) that he murdered Wait at the *time* and *place*, aforesaid ; the word *murder*, even when unaccompanied by the words *feloniously, wilfully* and of his malice aforesaid, comprising both the blow and the death ; both must combine to comport with its meaning. Thus to me it appears to be clearly alleged that Wait received the *blow* and died *at the city of New Orleans, in the parish of Orleans, and on the 29th December, 1844* ; as the only *time* or *place* mentioned in the indictment, are the city of New Orleans, parish of Orleans, the 29th December, 1844, and both stated as descriptive of the arena and epoch of this melancholy occurrence ; the words, at the *time* and *place* aforesaid, refer to *this time* and *this place*, and to no other, as no other is mentioned. I find, therefore, nothing in the grammatical structure of the sentence, which would exclude my construction of the words ; on the contrary much to confirm it.

The legal phasis which the words present, offers nothing to my mind, variant from true grammatical construction. To the decisions of the English judges and English courts, I have been taught to pay great respect and deference ; in fact their intrinsic merit would extract homage from the most unwilling and prejudiced mind ; but I can never forget, that the common law of *England* is not the common law of *Louisiana* ; that the Legislature, in adopting a code of laws for the prosecution of crimes, had declared (in the act of 1805,) that all the crimes, offences and misdemeanors therein named, shall be taken, intended and construed according to, and in conformity with the common law of *England*, and the forms of indictment, divested however of unnecessary prolixity, the method of trial, the rules of evidence, and all other proceedings whatsoever, in the prosecution of the said crimes, offences and misdemeanors, *changing what ought to be changed*, shall be, except as is by this act otherwise provided for, according to the said common law. In the case of *The State v. McCoy and others*, ante p. 545, this court declared, that the Legislature, in adopting the common law rules of proceeding, method of trial, &c., adopted the system as it existed in 1805, modified, explained and perfected by statutory enactments, so far as those enactments are not found inconsistent with the peculiar

character and genius of our government and institutions. The common law of England thus purified, modified and pruned, I understand as the law of Louisiana. I am aware that Judge Martin, in the case of *The Territory v. Nugent*, 1 Mart. 173, in commenting upon the act of 1805, asks: "How shall I ascertain what is *unnecessary prolixity*? If I open the records which have hitherto been decided, I find that what the prosecutor for the Territory calls an *unnecessary prolixity*, has been held by wise judges an essential averment, the absence of which vitiates the indictment." No doubt he did find it so, and for that very reason, and for no other, did the Legislature pass the act of 1805. Trammelled by old forms and musty authorities, we know it was a constant source of regret with the English judges, that they were not clothed with authority to disregard and repudiate them, as no longer adapted to the improved and improving mind of the age and country. *Sic lex scripta est*, was the stubborn and unbending rule to which all their decisions were compelled to conform; in consequence whereof they were obliged to resort to legal fictions and technical absurdities, for the purpose of avoiding the direct application of most of its requisitions; many of which have now become obsolete, and have quietly sunk into desuetude, by general acquiescence rather than legislative enactment. To aver that in Louisiana crimes are prosecuted according to the common law of England, is not strictly and critically true. Neither is the refusal of Judge Martin to obey the law, because in similar cases the judges in England and in the United States have not deemed themselves warranted to pass judgment, a good reason for such refusal. He is not borne out by the fact; for never were the judges in England nor in the United States, called on to pass or refuse to pass judgment in any similar case. No such statute as that of 1805 exists either in England or any of our sister States, so that no judge has ever (to my knowledge,) deemed himself unwarranted to *pass judgment in any similar case*. The refusal of Judge Martin to carry out the law, may be, and no doubt is, an evidence of his modesty, but the reason for the refusal is by no means satisfactory to me. If the Legislature had intended that their courts should only reject what an English court would have considered as unnecessary prolixity, and to preserve inviolate all that these courts considered *essential averments*, there would have been no necessity for the act of 1805; their courts would have been bound to do so without such an act. It could never have been contemplated, that the changes to be made, and the prolixities to be avoided, were those changes and that prolixity which would have been made or avoided in an English court. Can it, for an instant, be supposed, that the Legislature in pass-

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ing this act, had in view only such changes as are enumerated in the judgment of the court, such as "not having the fear of God before his eyes,"—"Middlesex, ss : the jurors for our Lord the King," &c. It is paying but an indifferent compliment to either the Legislature or the judiciary, to suppose so. These changes the English judges would not have hesitated to make, without the sanction of any law upon the subject; such changes they *have* always made, and are now making. Instead of the phraseology of the indictment in England, being, at this time "the jurors for our Lord the King," they have wisely substituted "the jurors for our Lady the Queen," or some such *formula*. This description if changed, a change required to make it conform to truth, *mutatis mutandis*, would have been made by all our courts *without* any legislative enactment. The act of 1805, therefore, to me seems intended to apply to a different state of things, and was passed for a different purpose. Great power is no doubt conferred upon the judges, to be exercised with the greatest caution, and not to be resorted to under vain and frivolous pretexts, nor upon *all* occasions; but it was a power which was necessary to be lodged *somewhere*. The idea that the Legislature could travel through the whole body of the common law, repudiating here, pruning there, re-enacting this provision and repealing that, is too preposterous to be entertained for a moment. The task was too Herculean; in fact, it was morally and physically impossible; and yet it was important and absolutely essential that this selection *should* be made, and the law winnowed from the trash and crudities, with which it was originally and in early ages incorporated. To what body of men then could this august mission have been more safely entrusted than to that of the judiciary, chosen for their supposed erudition and moral worth, and trained by education and practice to the investigation of such matters? To me it seems that this was not only the *proper* but the *best* course to adopt.

This court, and in fact, every court in the State having criminal jurisdiction, have exercised the right conferred by the act of 1805. Does the common law of England authorize new trials in capital cases? Does it justify that liberality of construction, and in many cases, that return to common sense, which every day characterizes their decisions? Did ever any one hear of an appeal having been taken by the Crown in a criminal case of any description? Yet these things are done, and rightfully, and legally done in our courts, changing what ought to be changed, by virtue of the act of 1805. This must be so or else we must take the common law, as we find it, for better, for worse, with all its imperfections and absurdities; and, instead of the judges being seated here, gravely examining questions of law, by recourse

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to *books* and authorities, the lists should be opened, and the trial by wager of battle substituted in its stead. The test by the corsned, and the convincing evidence of innocence furnished by the power of walking unscathed and unburned, over red hot ploughshares, would be substituted for their present and humane representative, the trial as now known and practised under our law. We must come to this, or my reasoning on the law is right. These features of the common law have never been altered by the Legislature, which adopted it as the law of Louisiana in criminal matters, and according to the opinion of the court, just read, can not be changed or rejected by the judiciary.

I have succinctly endeavored to show, first, that if submitted to the test of the ordinarily accepted signification of the words—their grammatical construction,—the manner in which they would be understood in common parlance—the result would be invariably the same: viz., that the blow was given in the city of New Orleans, parish of Orleans, on the 29th of December, 1844, and that the death happened at the same time and in the same place. The sentence in the indictment descriptive of the offence is a very long one, and to give effect to it, so as to convey the charge, as understood by the court, the copulative conjunction *and* must be enlisted in the service, and made to fill the same office to connect the sentence, which is denied to it, when sought to be applied to eke out the words *then* and *there* (*tunc et ibidem*) which are I think necessarily understood and implied by the rules of grammar, and thus removing every vestige of doubt as to the meaning of the words. This being the only natural meaning of the words, about which no two men, in the ordinary transactions of life, could entertain a doubt, let us see whether there be any thing arising from technicalities of the law, which would give to them a different meaning. That arbitrary rule of the common law, which gives to the *same* words different meanings when applied in cases of felonies, from the meaning they would convey in a case of misdemeanor *only*, may possess many recommendations to the eye of the felon, though to him convicted of the minor offence, the distinction so unfavorable to his case could scarcely command his assent or approval.

To one not seeking objections, not anxious to detect flaws where none exist, even in a *technical* point of view, it seems to me, this indictment is clear and explicit. It avers in the ordinary phraseology of the law, that the blow was inflicted in the city of New Orleans, and parish of Orleans, on the 29th December, 1844, (with all the precision required,) and that a few hours after he died. The smallest subdivision of time known to the law is called a *day*; no fractions of a day are noticed, according

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to the maxim, *de minimis non curat lex* ; that the major includes the minor is a postulate which the law easily recognizes and adopts ; but, *vice versa*, the minor can never include the major. Not losing sight of either of these propositions, is it not demonstrated, beyond the reach of cavil, that when it is alleged that the blow was given on the 29th December, and that a few hours after, the party died, that in the strictness of even technical precision, he must have died on the 29th, and not on any other day ? Had it been intended to aver that he died on the next day, it would have said so—that is, *that he died on the next day*, or that he died on the 30th ; but having alleged that the wound was inflicted on the 29th, and that he died after a few hours, it admits of no other meaning than that he died on the 29th. To declare that a particular fact happened on a given day of the month, and that, a few hours after, some other fact transpired, tested by any rule which may be adopted, must be understood as circumscribing the two events within the limit of the same day. So when we say a few minutes after twelve o'clock, we never under any circumstances intend to extend the time to one o'clock, nor would any one so understand us. Add to this the concluding words of the indictment, and to me, it seems impossible that any doubt should remain : “And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Samuel Kennedy, the said Benjamin Wood Wait, *on the day* aforesaid, *at the time* and *place* aforesaid, and in the *manner* and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder,” &c. The *time* aforesaid was the 29th December, 1844, (the *only* time mentioned ;) the *place* aforesaid was, the city of New Orleans, parish of Orleans, the *only place* mentioned ; and the manner aforesaid, by stabbing him with a knife, the *only manner* mentioned. All this is strictly in conformity to the truth. This explains any latent ambiguity which might be found in the obnoxious sentence. *Id certum est, quod certum reddi potest*. I readily concede, that to aver that the stroke took place on *two* days, as on the first and second of May, or on an impossible day would be fatal ; because being impossible it can never be reconciled, nor can truth be converted into falsehood. But my exposition makes it *conform* to truth in every particular.

For these reasons I am of opinion that the judgment of the inferior court should be confirmed.

APPLICATION FOR A RE-HEARING.

Preston, Attorney General, for a re-hearing. It is admitted, because the authorities are unanimous on that point, that if a material fact in an indictment be alleged with a certain day and place, the time and place of every other material fact which occurred on the same day, and at the same place, may be alleged, by referring by the adverbs *then* and *there*, to the time and place previously stated. It is admitted that it is stated in this indictment, with technical certainty, that Kennedy gave Wait a mortal stroke on the 29th day of December, 1844, in the parish of Orleans. Now the question is, whether the death of Wait, is referred by the adverbs *then* and *there*, in the indictment, to the said *time* and *place*, with technical certainty.

The indictment states, that Kennedy gave Wait a mortal stab, in the parish of Orleans, on the 29th of December, 1844, of which mortal stab he *then* and *there* suffered, languished, lived, and a few hours thereafter died.

All grammarians will agree, that the death is referred, in the foregoing sentence, by *then* and *there*, to the parish of Orleans, and the 29th of December, 1844.

The words "a few hours thereafter," are inserted in the statement to show precisely the facts which occurred. They refer, by grammatical construction, and by their inherent meaning, to the mortal stroke. They do not refer to the fact that Wait suffered, languished and lived, because he could not die a few hours after he suffered, languished and lived, but must have died the instant he ceased to suffer, languish and live.

The words "a few hours thereafter died," referring, therefore, to the mortal stab, and qualifying the death, as certainly connect the death with the day of the mortal stab, as the repetition of the word *then* would have done.

As to place, it is the opinion of the court, the indictment should have read thus: "Of which mortal stab the said Wait *there* languished and lived, and a few hours thereafter *there* died." The repetition of the word *there* adds nothing to the precise certainty of the place of the death, and therefore, is merely unnecessary prolixity, forbidden by the act of 1805.

I cannot admit for a moment, that the judgment in this case would have been arrested at common law, even before the statute of George the 4th abolished all these miserable technicalities in England. Hale, and Kenyon, and Ellenborough, and Mansfield, and Chief Justice Eyre, never would have arrested this judg-

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ment after what they are reported to have said at pages 139 and 140 of Chitty's Criminal Law.

There are but two *decisions* that can be found which give any countenance to such technicalities. One reported in black letter Norman French, at pages 68-69, of Dyer, in the reign of Edward the sixth; and Cotton's case, in the reign of Queen Elizabeth. In the margin of the former case, Leonard, and Coke's Institutes, are cited, later authorities to the contrary; and Lord Hale in stating the decisions says, they were given *in favorem vitæ*.

In Cotton's case, the allegation was, that Cotton, on the day, and at the place, having an axe in his hand, struck Spencer, whereof she the same day and year died. Exception was taken to the indictment, and it was held ill, because the place was alleged where he had the weapon in his hand, but not where he struck, or she died.

But this case is entirely different from the one before the court. The time and place were not connected, as here, by the copulative conjunction "*and*," with the death; but qualified the having an axe in his hand, and not the stroke with the axe.

I have not seen the decision, that the *then* and *there* cannot be connected with the death, by the copulative *and*; but that they must succeed and not precede the *and*. If there be such a decision, it is contrary to grammatical rules, and to the common understanding.

It cannot be pretended, but that the whole of the consequences of the mortal stroke given to the deceased Wait, are referred by the technical words *then* and *there* to the time and place when and where the mortal stroke was given, according to the strict rules of grammatical construction. *Then* and *there* qualify the words immediately following them, and all words connected with them by the copulative *and*.

Chitty indeed states, that that conjunction is not sufficient in some cases, but cites no authorities in support of his assertion; nor does he specify the cases in which it is insufficient. Pages 181, 220.

But if this indictment could have been arrested at common law, it cannot be by our courts. They are directed by the act of 1805, to change what ought to be changed in criminal proceedings. In England they have changed by statute the practice of arresting judgments on such frivolous pretexts. No one will pretend that such a practice ought not to be changed here. Judgment was arrested in but two instances on such a ground in England, and that two or three hundred years ago. We have no knowledge of those remote and obscure cases; but we know, that the courts expressly say, that the technicalities were admitted *in favorem vitæ*, and were inadmissible where the punishment was not capital. And why admitted *in favorem vitæ*? Because a new

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trial *could not be granted*, and for no other reason. No doubt, therefore, the courts finding a man convicted, *but innocent*, sought the pretext for arresting judgment, *in favorem vitæ*, which the rules of law forbid in cases not capital.

Under the power to change what ought to be changed, this court established, in the case of Hornsby, that a new trial should be granted in capital cases. They *had no other authority* to grant that new trial, except the power to change what ought to be changed in the common law, which allowed no new trial in capital cases, and by the principles of which they were bound until changed.

The court in making this great change, abolished the whole reason on which the courts in England, two hundred years ago, allowed this frivolous technicality, in arrest of judgment, *in favorem vitæ*; and by abolishing the whole reason for allowing it, abolished the technicality itself.

The court did not notice the argument, that the place of the death has become immaterial, by our law's authorizing the prosecution at the place where the mortal stroke was given; and that the time of the death was immaterial, if the whole record showed that the death occurred within a year and a day after the mortal stroke. Archbold, 385. I relied with great confidence on these points, for I cannot conceive how a most solemn proceeding can be set aside for mere arbitrary rules, without reason. *Cessante ratione, cessat et lex*.

JOHNSON J. The majority of the court who concurred in the decision rendered in this case, have considered the grounds urged by the attorney general for a re-hearing, without being brought to the conclusion that it ought to be granted. Time and place must be added to every material fact in an indictment. In an indictment for murder, the death must be laid on a day within a year and a day from the time at which the stroke is alleged to have been given. The time and place of the death of Wait became a material fact to be alleged in the indictment. It is immaterial that the time and place is not alleged strictly according to the truth, since, in that case, if the proof shows that the death was within the year and day, it is sufficient. But the indictment must allege the day of the mortal wound, and the day of the death, with certainty, and not leave it to be inferred by inductive reasoning. The indictment must, from an inspection, and by comparison of the date of the mortal wound with the date of the death, show that the death has occurred within the limit of the year and a day. Thus, for instance, after averring the day of the mortal wound, continue: "of which said mortal wound the said J. N., from the said 3d day of May, in the year aforesaid, until the 15th day of the said month, at the parish aforesaid, in the county aforesaid, did lan-

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guish, and languishing did live; on which said 15th day of May, in the year aforesaid, at the parish aforesaid, in the county aforesaid, of the said mortal wound did die." This form leaves no room for doubt as to the two periods of the mortal wound and of the death. How is the matter stated in the indictment now in hand? After alleging that the mortal blow was given on the 29th of December, 1844, it continues; "of which mortal wound so given by the said Samuel Kennedy, with the deadly weapon aforesaid, the said Benjamin Wood Wait did then and there suffer and languish, and languishing did live; and a few hours afterwards did die of the said mortal wound." How, we ask, is it proved on inspection of the indictment, by a comparison of the day of the mortal wound with the above account of the time of of the death, that the wound and the death both occurred on the 29th of December, 1844? It is much easier to prove by process of reasoning, that it occurred on the 30th of December. For if the wound was inflicted on the 29th, and Wait then and there, (that is, at the parish of Orleans, on the 29th of December,) did languishingly live, and a few hours after, (that is to say, a few hours after the 29th of December,) did die of the said mortal wound, it would seem that he did not die on the 29th, but on the 30th. But in this respect, the indictment must prove itself; and the maxim "that is certain which may be rendered certain," has no force here.

We have already said, that we can take nothing to our aid in this instance, from the act of 1835, introductory of the common law. If we could, it would turn out an universal panacea for all defects in indictments, till at length it would be said, that an indictment needs no particular form. But the attorney general thinks that, in granting Hornsby a new trial, we must have drawn on that statute for the power. We were not aware of it, supposing that our right to grant a new trial, when justice and humanity required it, depended upon the act of the Legislature organizing this court, as well as upon the practice in our courts.

Re-hearing refused.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF ERRORS AND APPEALS,
IN
NEW ORLEANS, FEBRUARY, 1846.

PRESENT :

HON. THOMAS C. NICHOLLS.
HON. GEORGE ROGERS KING.
HON. WILLIAM D. BOYLE.

THE STATE v. EZEKIEL FERGUSON.

In a prosecution for murder where the court is satisfied that the jury cannot agree in a verdict, it may discharge them, though the prisoner oppose it, and may direct a trial before another jury.

APPEAL from the District Court of East Baton Rouge, *Boyle, J. Preston*, Attorney General, for the State, cited 4 Black. 355. Chitty, 376. *United States v. Coolidge*, 2 Gallison, 364. *The People v. Goodwin*, 18 Johns. 200. *The People v. Green*, 13 Wend. 56. *Commonwealth v. Bowden*, 9 Mass. 494. *United States v. Perez*, 9 Wheat. 580. *State v. Brown*, ante, p. 566. *Burk*, for the appellant.

NICHOLLS, J. The accused, charged with the crime of murder, invokes the aid of this court to release him from all further prosecution, in consequence of the court, *a qua*, having discharged the jury empannelled to try him; the said jury not having been able to agree upon a verdict.

The record shows, that on Saturday, the 24th of January last, upon the trial of this case, the jury having come into court and stated the impossibility of their agreeing upon a verdict, it was ordered by the court, the prisoner dissenting, that a juror be with-

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drawn and a mis-trial entered. This dismissal of the jury, in opposition to the wishes of the accused, is considered by his counsel as equivalent to an acquittal, and that he cannot be legally called upon to answer to the charge, before another jury.

To deny to courts, in *all* cases, the right to discharge a jury, when no verdict can be had, would lead to consequences so calamitous and unjust, and would tend so frequently to defeat the ends for which courts are instituted, that we should hesitate long before adopting such conclusion. Nothing short of the most imperative, positive, and unequivocal mandate of the law, could constrain us to sanction a doctrine, where the law would be on the one side and reason on the other. Aware of this result from the consideration of the principle *in extenso*, the right to discharge the jury, in certain excepted cases, is conceded to the court; but is to be confined and restricted, according to the argument of the counsel of the accused, to cases of *absolute necessity*. This concession or partial adoption of the principle, which was too palpably self-evident not to be admitted, covers the whole ground, and reduces the matter to the simple question, *necessitas vel non?* Of the existence of this necessity, the court must *necessarily* be the judge—an authority to be exercised in *all*, particularly in *capital* cases, within the limits of a sound legal discretion. The power to apply the remedy, *must* be lodged *somewhere*, else courts would be converted as often into snares for the innocent, as engines for the punishment of the guilty; and it can be lodged only with the *court*, before whom the trial is had.

Without straining the imagination in search of cases illustrative of the principles involved in this investigation, the books furnish ample materials to guide the courts in the exercise of this delicate power. In the case of *The King v. Edwards*, (4 Taunt. Rep. 309,) the words of the court are as follows; "One of the jurors fell down in a fit, and was pronounced by a physician, under oath, incapable of proceeding on the trial, on that day, whereupon the jury was discharged. The point being argued before all the judges in England, (except Mansfield,) the judges, without hearing the counsel for the crown, said, that it had been decided in so many cases, it was now the settled law of the country," and gave judgment accordingly. So in the case of *The King v. Stephenson*, (Leach's C. C. 618;) "The prisoner fell down in a fit during the trial, and the jury was discharged; and, upon his recovery, he was tried and convicted by another jury." In the case of *The United States v. Coolidge*, (2 Gallison's Rep. 364,) a witness refusing to be sworn, the trial was suspended during the imprisonment of the witness for contempt; and Mr. Justice Story held, that the discretion to discharge a

jury existed in all cases, but that it was to be exercised only in very extraordinary and striking circumstances.

These citations are considered sufficient to point out to the court which tries a prisoner, the limits beyond which it should not go, in the exercise of its discretion. The sessions of the District Court in the parish of Ascension, (and probably some other parishes in the State may be in a like situation,) are limited by law to a *single week*, and the judge who there presides is likewise the judge of the District Court of the adjoining parish of St. James, whose sessions commence on the following Monday. Granting to the accused in a capital case in the *former* parish, the delays necessary to furnish him a copy of the indictment and the panel of the jury, (and of these delays he cannot be deprived,) it is manifest, that in almost every instance, it would be equivalent to a verdict of acquittal, if you withhold from the court the power to discharge the jury, in case of disagreement. It would be a proclamation to the guilty, that impunity was certain, and secured by the mere employment of counsel for the purpose of speaking against time, of spinning out the argument, and occupying the time of the court until the clock struck the fatal hour of twelve on Saturday night, when court and jury, judge and juryman, would all vanish, by the fiat of the law, leaving the guilty one alone, washed from the consequences of his crime, reintegrated in his privileges as a citizen, and let loose upon society to repeat similar atrocities, with a similar result; for it should not be forgotten, that, in the United States, the judges are not clothed with the same authority (which the exigencies of an age of barbarism formerly conferred upon the judges in England,) of trundling the jury after them, from county to county and from circuit to circuit, until they could agree, in hampers or baskets made expressly for the purpose—a happy invention truly, and wonderfully well adapted to ensure unanimity, and to afford an unerring and certain test of innocence or guilt. These absurdities have disappeared before the advancing light of reason and of law; and the boast of English jurists, that the common law of England is the perfection of reason, is vindicated and approved by rejecting and repudiating them as having never constituted part or parcel of the same.

Error, however sanctified by authority, or hoary by time, cannot be permitted to invoke the antiquity of its existence as a justification of its aberrations, but, on the contrary, should be renounced whenever and wherever it is discovered to lurk. *Malus usus abolendus est*, says the same common law, with regard to customs; a like sentence should be pronounced against error when detected.

Many of the early, all of the modern decisions in England and

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the United States, accord to courts the power exercised in the present instance. Justice could not be administered *without* it. The amount of *fancied* evils flowing, as it is alleged, from the concession of such power to courts of justice, would be more than compensated by the possible, probable, nay, positive infliction of wrong upon the unhappy class of persons themselves, for whose benefit and protection the rejection of the power is now invoked. In fine, we adopt the language of Judge Story, in the case of *The United States v. Perez*, 9 Wheat. 580, as comprehending all the law on the subject. "We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated; they are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere; to be sure, the power ought to be exercised with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner; but after all, they have the right to order the discharge, and the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office."

Wherefore it is ordered that this case be remanded, that a *venire de novo* be awarded, and that the court, *a qua*, proceed in the premises according to law, and agreeably to the principles herein established.

THE STATE v. MATHEW J. JONES.

The incompetency of one of the grand jurors by whom a bill of indictment has been found, is not cured by the omission to urge the objection on the first day of the term of the district courts in the country parishes. The 5th sec. of the stat. of 6 March, 1840, applies only to the formalities to be observed in the summoning, formation and drawing of the grand jury, and not to the want of qualification in any of its members.

The incompetency of any one member of a grand jury by whom an indictment has been found, will vitiate the whole proceeding, no matter how many unexceptionable jurors joined with him in finding it.

APPEAL from the District Court of Rapides, *King, J. Preston*, Attorney General, for the State, appellant.
A. N. and O. N. Ogden, contra.

BOYLE, J. In this case, a motion was made in the lower court, by the counsel for the defendant, to quash the indictment preferred against him, on the following grounds, to wit:

1. Because twelve jurors did not concur in the finding of the indictment.

2. Because the indictment was not found by a competent grand jury, there being persons on the jury not qualified and competent, according to law.

The motion was sustained, and the indictment quashed; and from this judgment, the district attorney has taken an appeal to this court.

It satisfactorily appears, from the evidence taken on the trial of the motion, that Hadley P. Roberts, one of the members who sat on the grand jury, at the November term of the court, in 1844, when the bill of indictment was found, owned no taxable property in the years 1843 and 1844; that his name was not on the tax list of 1844, and although on that of 1843, that he had no property carried out on the list opposite to his name.

By the act of 25th March, 1831, the qualifications of a juror to serve in any of the courts of this State, are declared to be the following:

1. To be a free white male citizen of the State of Louisiana.
2. To be of full age and sound mind;
3. Not to be an apprentice, or an indented, or a domestic servant;
4. Not to have been adjudged guilty of any crime punishable according to the laws of this State, with death, or imprisonment at hard labor.

5. To have resided at least twelve months before a new *venire* is formed, in the parish or district in which the jury is summoned.

6. *To have paid, or to be liable to pay, a State, parish or city tax.*

In accordance with the provisions of the act of 6 March, 1840, the list of persons to serve as jurors in the several district courts of the State, must be drawn in every year; the list from which the *venire* of forty-eight to serve as grand and petit jurors, at the November term of the district court, for the parish of Rapides, in 1844, must, therefore, have been drawn within that year. Yet neither in that year, nor in the year previous, did the grand juror Roberts own any property, nor had he paid, nor was he liable to pay a State, parish or city tax. It is, however, urged, that the 5th section of this act destroys the effect of all objections of this character, unless made on the first day of the term of the dis-

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strict court, to which the jurors are summoned, and not afterwards. The provisions of that section are confined "to any defect or informality which may have occurred, either in the formation, drawing or summoning of said juries, or any other defect whatsoever in the construction of said juries."

To give a different construction to this statute than that conveyed by its obvious language—to decide that no objection could be made to the competency of any individual summoned as a juror, to serve at each term of the district courts, unless upon the first day of the term, would be to deprive every person accused of a criminal offence of the right to challenge jurors for cause, a right which it is scarcely necessary to say may be exercised before the petit jurors are sworn in chief.

It only remains for this court to decide upon the legal effect of the objection taken to the want of competency in one of the members of the grand jury which found the bill. Twelve of that body, (usually numbering sixteen, as in the present instance,) may find a true bill, and it might be said, that although one of the sixteen should have been incompetent, the remaining fifteen or even twelve of them, would be sufficient to legalize the finding.

The wise policy of the law, however, which forbids any grand juror to disclose the secrets of his fellows or his own, leaves to the court which presides over their deliberations, no means of distinguishing who of the grand jurors have found, or who ignored the bill, and no means of ascertaining whether the bill has been found by the legal number of competent grand jurors, unless the whole body should be composed of such persons.

The common law of England, which governs our methods of trial, and all our proceedings in the prosecution of crimes, furnishes us with safe precedents in all matters connected with the inquest before the grand, and the trial before the petit jury.

The statute of the 2d Henry IV. c. 9, which is declaratory of the common law, and on the same subject as our act of 25 March, 1831, uses the following expressive language: "That from henceforth no indictment be made by any such persons, but by enquests of the King's lawful liege people, in the manner as was used by his noble progenitors, returned by the sheriff, &c., and other officers to whom it pertaineth to make the same, according to the law of England; and if any indictment be made hereafter, in any point to the contrary, that the same indictment be also void, revoked, and forever holden for none."

We find from Hawkins' Pleas of the Crown, book 2d, chap. 25, sects. 26, 27, 28, that in the construction of this statute, the following points have been decided:

"That a person arraigned upon any indictment taken, con-

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trary to the purview of this statute, may plead such matter in avoidance of the indictment.

"That a person outlawed upon any such indictment without a trial, may show, in avoidance of the outlawry, that the indictment was taken contrary to the form of the statute.

"That if any one of the grand jury, who find an indictment, be within any one of the exceptions of the statute, he vitiates the whole, though never so many unexceptionable persons joined with him in finding it."

We feel satisfied that the language of the statute of Henry, and the construction given to it by the English courts, furnish the wisest and safest rule of decision; and that the incompetency of one of the grand jury so to find a bill of indictment, vitiates the whole proceeding.

We therefore think, that the objection to the competency of one of the grand jurors in the case before the court, was well taken, and that the judgment of the district judge, in quashing the indictment, was correct.

Judgment affirmed.

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☞ For Points decided by the Court of Errors and Appeals, see title CRIMINAL LAW.

ADMINISTRATOR.

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AGENCY.

- I. *Appointment and Powers of Agent.*
- II. *Responsibility of Agent to Principal.*
- III. *Responsibility of Agent to Third Persons.*
- IV. *Responsibility of Principal to Third Persons.*

I. *Appointment and Powers of Agent.*

1. Where a contract between a mortgagor and his mortgage creditors recites, that the former "shall be at liberty to sell any part of the mortgaged property, on paying to their agent a proportion of the purchase money equal to the proportion which the whole mortgaged security bears to the whole mortgage debt, and that thereupon their agent shall release the mortgage on the property so sold," the agent is authorized to release the mortgage only in the event of his having previously received the stipulated portion of the part so sold. *Sewell v. Hennen*, 216.
2. No particular form is required for a mandate. For certain purposes it must be express and special; (C. C. 2966;) for others, it may be verbal and general. *Ib.* 2961. It may vest an indefinite power, to do whatever may conduce to the interest of the principal. *Ib.* 2964. And when powers are granted to a person exercising a profession, or performing certain functions, the authority is to be inferred from the functions which the mandatary exercises. *Ib.* 2969. *Miller v. Canal and Banking Company*, 236.
3. The contract of mandate may be tacit as well as express; and the acts of the principal must be fairly and liberally construed towards those who contract with the agent, as well as towards the agent. *Ib.*

4. Where the law requires a contract to be in writing, the power to execute it must be in writing also ; but where this is not required, the power may be in the simplest form, and the intention of the parties may be gathered, as much from their acts, as from their agreements. *Ib.*
5. A mandate given in writing, in express terms, cannot be enlarged by parol evidence ; but, as a general rule, where authority is given by informal instruments and confers general powers, they should be construed with more liberality than more formal and deliberate instruments. The authority should also be construed, as to its nature and extent, according to the terms used and the objects to be accomplished. *Ib.*
6. An agent by whom a contract has been executed, and who has been released by the plaintiff from any liability to him, may be examined as a witness in an action on the contract, to prove the extent of his powers. *Ib.*
7. The second clerk of a steamer, may execute on behalf of the boat, a bill of lading in the ordinary way, and his receipt for merchandize delivered on board, will be binding ; but to make a special contract—as to bind the boat for articles not delivered on board, his authority must be shown.

Kirkman v. Bowman, 246.

II. Responsibility of Agent to Principal.

8. An agent is responsible for interest on any sum of money employed for his own use, from the time of so employing it. C. C. 2984. *Marr v. Hyde, 13.*
9. A judgment rendered against the master and other owners of a steamer for damages, for injury sustained in consequence of the fault of the master, having been paid by the latter and one of the owners, they sued the other owner to recover his proportion of the damages. Defendant denied his liability to pay any thing to the master, who had the exclusive control of the boat at the time of the injury ; and prayed that, for any amount which he might be condemned to pay to the other plaintiff, he might have judgment in warranty against the master : *Held*, that defendant is not bound to reimburse to the master any portion of the damages occasioned by his own fault (C. C. 2972) ; and that, though defendant, if he pay any portion of the loss, may have recourse against the master, the latter cannot be cited in warranty, his liability not being a case of personal warranty within the meaning of art. 379 of the Code of Practice. *Per Curiam* : Until defendant pays a portion of the loss he has nothing to claim of his agent, and can have no judgment against him. *Howrin v. Clark, 27.*

III. Responsibility of Agent to Third Persons.

10. A marshal is responsible to the party injured, for any damage sustained by the latter in consequence of an illegal sequestration of his property. The marshal must look for indemnity to the party under whose directions he acted. *Lartigue v. Claiborne, 115.*
11. Where a draft, drawn by one as agent for a succession, was accepted, on the faith of the succession and not of the agent personally, for the purpose of raising funds for the purchase of supplies for a plantation belonging

to the succession, for the use of which the proceeds were applied, and the authority of the agent to contract for the succession is not denied, the agent cannot be made personally liable for the draft. The acceptance of the draft is an admission of the agent's right to draw in that capacity, and throws on the acceptors the burden of proving the want of authority.

Duncan v. Barnard, 138.

IV. Responsibility of Principal to Third Persons.

12. The owners of a steamer are liable for any injury to others, resulting from the fault of those charged with the navigation of the steamer.

Enders v. Steamer Henry Clay, 30.

13. Where, in consequence of the neglect of the agents of a railway company to chain or put blocks under the wheels of cars left standing on a track, constructed on a pier used as a public highway, one, who was crossing the track at a point over which it was necessary for him to pass in order to reach his vessel, moored to the pier, is, during a dark night, and without any fault on his part, run over and seriously injured by the cars, which had been put in motion by a strong wind, he will be entitled to recover damages to the extent of the injury sustained. C. C. 2294, 2295.

Brown v. Pontchartrain Railroad Company, 45.

14. Where one employed by the lessee of a market to collect his dues, but not to superintend its police, causes a person to be arrested for making a disturbance in the market, the act not being within the scope of his authority as agent, cannot subject the principal to damages for any injury resulting therefrom. *Gerber v. Viosca*, 150.

15. To ascertain whether one employed by a corporation to superintend and direct the construction of a canal, had authority to enter into a particular contract relative to labor to be done in its construction, on behalf of his employers, all the facts and circumstances of the case should be taken into consideration. The authority to make such a contract need not be express and special; it may be inferred from circumstances, and the objects of the parties. *Miller v. Canal and Banking Company*, 236.

16. In an action on a contract alleged to have been executed by an agent of the defendants, the latter cannot object to the contract's being read in evidence, on the ground that the authority of the agent had not been proved; but if no authority be afterwards shown, or none can be properly inferred from the evidence, the contract will be of no avail. *Ib.*

AMENDMENT.

See *SHERIFF*, 5.

ANSWER.

See *PLEADING*, II.

APPEAL.

1. No appeal will lie to the Supreme Court from an order of the District Court, directing a mandamus to a parish judge commanding him to allow an appeal to the District Court from a judgment rendered by him on an opposition made under the stat. of 26th March, 1842, relative to lands divided into town lots. Such an order is not a final judgment in any case pending before the District Court. C. P. 566, 839. *Aliter*, had the mandamus been refused. *City of Lafayette v. Parish Judge of Jefferson*, 5.
2. No appeal will lie where the amount in controversy is less than three hundred dollars. *Saloy v. Ytasse*, 9.
3. Where the surety offered by a party to whom a suspensive appeal has been allowed, is insufficient, or has not been given in time to entitle him to a suspensive appeal, the order allowing the appeal should not be set aside, if the surety be sufficient, and the application was made in time, to entitle the party to a devolutive appeal. In such a case, the effect of the failure to comply with the requirements for a suspensive appeal, is to render it devolutive only, and to authorize the issuing of an execution.
Brode v. Firemen's Insurance Company, 38.
4. The stat. of 22 March, 1843, sec. 2, dispensing with notices of judgment in certain cases, does not apply to the case of a judgment against a garnishee, by whom interrogatories had been answered, rendered on a rule to show cause, where the rule was not served on the garnishee in consequence of his absence from the state; and where, in such a case, notice of judgment was subsequently served on the garnishee, the time within which an appeal will lie must be calculated from the date of the notice. *Ib.*
5. Where the record contains no statement of facts, bill of exceptions, or assignment of errors, and it is not certified by the judge, as required by art. 586 of the Code of Practice, and the certificate of the clerk does not show that it contains all the evidence introduced on the trial below, the appeal must be dismissed. *Second Municipality v. Martin*, 148.
6. Motions to dismiss appeals must be filed in writing before joinder in error or answer to the merits, or such preliminary objections will be considered as waived. *Shall v. Banks*, 168.
7. No judgment can be given on appeal, which the court, *a qua*, was incompetent to render. *Waggaman v. Zacharie—Rehearing*, 190.

See CRIMINAL LAW, XVIII.

ARREST OF JUDGMENT.

See CRIMINAL LAW, 15.

ASSAULT.

See CRIMINAL LAW, 11, 25.

ASSIGNMENT.

1. It was not the object of the English statute of 13th Eliz. ch. 5, to invalidate fair and *bona fide* transactions; nor is every conveyance which has the effect of delaying or hindering creditors, in itself fraudulent. It must be devised "of malice, fraud, covin, collusion or guile," to bring it within the statute. *United States v. Bank of United States*, 262.
2. Conveyances or assignments to one or more creditors for the security or satisfaction of a debt due by the grantor, are, *prima facie*, good, within the stat. of 13th Eliz. ch. 5. *Ib.*
3. By the laws of Pennsylvania, a debtor, whether insolvent or not, may make either a partial or general assignment of property, either in possession or in action, for the benefit of his creditors, and may prefer one to another. *Ib.*
4. An assignment of property, real or personal, to trustees for the benefit of the creditors of the assignor, legal and valid by the laws of the State in which it was made, and accompanied by delivery, will be respected in this State. Such contracts must be governed by the law of the place where they were executed. C. C. 10. C. P. 13. *Ib.*
5. By the laws of Pennsylvania, a corporation is as competent as a natural person to make an assignment for the benefit of creditors, and to give a preference to one or more creditors, even after insolvency. *Ib.*
6. The statute of Pennsylvania, of the 4th May, 1841, authorized the president, directors and company of the Bank of the United States, to dispense with the inventory and bond and surety required by the statute of 1836, in the case of a partial, as well as in that of a general assignment of its property for the benefit of its creditors. Ss. 19, 20. *Ib.*
7. The assignments made by the Bank of the United States, for the benefit of certain of its creditors, on the 7th June, and 4th and 6th September, 1841, are valid under the laws of that State, and sufficient to transfer the property of the bank in this State. *Ib.*
8. It is no objection to the validity of an assignment for the benefit of creditors, under the laws of Pennsylvania, that it has not been expressly accepted by them. Acceptance will be presumed where it is shown that the assignment was for their benefit, and there is no stipulation for a release of the debts, nor any thing calculated to delay the creditors unreasonably. *Ib.*
9. To entitle the United States under the act of Congress of 3d March, 1797, s. 5, to have any debt due to them first satisfied out of the property of an insolvent, where the latter has made a voluntary assignment for the benefit of his creditors, there must be an actual insolvency though not a declared one, and the assignment must have been a general one; but a party cannot, by assigning all his property by different acts, defeat the priority of the United States, under the pretext of the assignments being partial. *Ib.*

ATTACHMENT.

1. It is too late, after an appearance and answer by the defendants and a trial on the merits, to move to set aside an attachment.

Enders v. Steamer Henry Clay, 30.

2. Where in an action commenced by attachment against a steamer, its captain and owners, the names of the owners are not set forth in the petition, but defendants answer to the merits without pleading any exception, and, on judgment being rendered against them personally, execute an appeal bond disclosing their names, no objection can be made to the irregularity of a judgment *in personam* against them, on the ground of the omission to set out the names of the owners. *Ib.*
3. Where property attached is released on the execution of bond with surety, and the debtor makes a surrender of his property before judgment, after which the action is cumulated with the insolvent proceedings, and a judgment for the claim is entered up with the consent of the syndic, the surety will be discharged. *Per Curiam*: Had no bond been given, the property attached would not have been subject to satisfy the judgment rendered against the syndic, but would have formed a part of the general fund from which all creditors were to be paid. The bond represents the property attached, so far as the attaching creditor is concerned. If, under the judgment against the syndic, the attaching creditor could have had no privilege on the property seized, he can have no right upon the bond, as the property represented by it has gone to the benefit of the mass of the creditors.
Keyes v. Shannon, 172.
4. A garnishee cannot interfere, as to the merits of the case, between the plaintiff and defendant. *Brode v. Firemen's Insurance Company*, 244.
5. Where the master of a steamer, for the fraudulent purpose of aiding a debtor in removing his property into a foreign country beyond the reach of a creditor, conceals from the latter the fact of his having entered into an arrangement with the debtor for its removal, and, with a full knowledge of the rights of the creditor, transports the property out of the United States, thereby preventing the creditor from levying an attachment and saving his debt, he will be liable to the creditor for the amount of the debt, where it does not exceed the value of the property so removed.
Irish v. Wright, 428.
6. An attachment may be obtained though the debt be not due, provided the plaintiff make oath to the existence of the debt, and comply with the other requisites of the seventh section of the stat. of 7 April, 1826. C. P. 240, 242, 243. *Ib.*
7. After property attached has been bonded, and the case is at issue on the merits, it is too late to object to the attachment as irregular, in consequence of the suit being for damages. *Ib.*

ATTORNEY AT LAW.

1. A court may propound interrogatories to an attorney against whom an attachment has been issued for a contempt, for the purpose of ascertaining whether he was the author of the petition containing the contemptuous language for which the attachment was issued, and his intention and motive in writing it; and the court may require an answer to them. Nor is this right

a violation of the provision of the 18th sect. of the 6th article of the constitution, which declares, that "in criminal prosecutions no one shall be compelled to give evidence against himself." *State v. Soulé*, 500.

2. Contemptuous language contained in a petition, prepared by an attorney, for a re-hearing of a cause pending before the Supreme Court, though filed with the clerk without a formal motion in court, will subject the offender to punishment for a contempt. Stat. 27 March, 1823, § 3. Such a petition must necessarily pass under the notice of the court, while in session; and, being required by art. 912 of the Code of Practice to be presented when the court is in session, in the absence of proof to the contrary it will be presumed that it was filed according to law. *Ib.*

AUCTION.

See EVIDENCE, 15, 16.

AUTERFOITS ACQUIT.

See CRIMINAL LAW, 11.

BANK.

1. The cashier of a bank has, *prima facie*, authority to endorse, on behalf of the bank, negotiable paper held by it, in payment of its debts. *Per Curiam*. He is the general agent of the bank, through whom all its money transactions are conducted. His signature is generally considered to be that of the bank, in all its negotiations; and his endorsement will be presumed to be that of the bank, without its being necessary to show any special authority. *Merchants Insurance Company v. Chauvin*, 49.
2. The statute of Pennsylvania of the 4th May, 1841, authorized the president, directors and company of the Bank of the United States, to dispense with the inventory and bond and surety required by the statute of 1836, in the case of a partial, as well as in that of a general assignment of its property for the benefit of its creditors. Ss. 19, 20.
United States v. Bank of United States, 262.
3. The assignments made by the Bank of the United States, for the benefit of certain of its creditors, on the 7th June, and 4th and 6th September, 1841, are valid under the laws of that State, and sufficient to transfer the property of the bank in this State. *Ib.*
4. The seventh section of the statute of the State of Mississippi, of the 21st February, 1840, which declares that, "it shall not be lawful for any bank in that State to transfer by endorsement, or otherwise, any notes, bills receivable, or other evidence of debt," did not impair any obligation contained in the charter of the Planters Bank of Mississippi, and is not a violation of any prohibition in the constitution of the United States. *Per Curiam*: The

statute does not impair the obligation of any contract existing between the bank and its debtors. It modifies the capacity of the bank to cede to another the right to enforce such contracts. Nor can the bank be said to have any vested right to make such a transfer, resulting from any contract with the State. The capacity of contracting is generally within the power of the Legislature, in reference to future contracts; and remedies may be modified at its will. *Hyde v. Planters Bank*, 416.

BANK NOTE.

1. The destruction of a bank-note by fire, or otherwise, does not destroy the obligation of the bank to pay.

Wade v. Canal and Banking Company, 140.

2. Where in an action against a bank for the amount of notes alleged to have been destroyed by a fire which consumed the residence of the plaintiff, the evidence leaves no doubt of the destruction of the notes, plaintiff will be entitled to a judgment for their amount on the condition of executing a bond with surety, to indemnify the bank, in case it should afterwards appear that the notes were not so destroyed. *Ib.*

BANKRUPT.

1. Decision in *West v. His Creditors*, 5 Rob. 261, affirmed.

West v. Creditors, 123.

2. The bankrupt law of 1841 did not suspend the operation of the State insolvent laws, in cases in which proceedings had been commenced before its passage. *Ib.*
3. The District Court of the United States, sitting in bankruptcy under the act of Congress of 19 August, 1841, was authorized to cite persons holding mortgages, under the State laws on property surrendered by a bankrupt, and to order the erasure of their mortgages, when necessary for the settlement of the bankrupt estate. *Ducros v. Fortin*, 165.
4. Where one holding a mortgage on property surrendered by a bankrupt under the act of 19 August, 1841, though cited before the District Court of the United States in which the proceedings in bankruptcy were pending, to show cause why the property mortgaged should not be sold free of encumbrance, reserving his rights upon the proceeds, suffers the rule taken on him to be made absolute without opposition, he must be considered as having waived any right he may have had to oppose it, and he will be bound thereby. He cannot afterwards be permitted to set up his mortgage against a *bona fide* purchaser, who has bought on the faith of his apparent acquiescence. *Ib.*
5. Decision in *Conrad v. Prieur*, 5 Robinson, 49, affirmed.
Benjamin v. Prieur, 193.
6. An impeachment of the certificate and discharge of a bankrupt under the act of Congress of 19 August, 1841, as having been "obtained in error and

fraud, the said bankrupt having fraudulently made payments, given securities, conveyances and transfers of his property, and made agreements in contemplation of bankruptcy, and for the purpose of giving certain creditors, endorsers and sureties, preference and priority over his general creditors, and over the plaintiff," is too vague and indefinite. It should have specified the particular error or fraud complained of. *Hazard v. Boykin*, 253.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The holder of a note cannot recover on it, without proving the signatures of previous endorsers by whom he alleges that the note was transferred to him. He might have recovered against the makers, on proof of the endorsement of the payee, without proving the signatures of the subsequent endorsers, had he not set forth such endorsements, and claimed under them.

Hill v. Buddington, 119.

2. The holder of a note can strike out at the trial those endorsements only, which have not been stated in the petition. *Ib.*
3. Where a draft, drawn by one as agent for a succession, was accepted, on the faith of the succession and not of the agent personally, for the purpose of raising funds for the purchase of supplies for a plantation belonging to the succession, for the use of which the proceeds were applied, and the authority of the agent to contract for the succession is not denied, the agent cannot be made personally liable for the draft. The acceptance of the draft is an admission of the agent's right to draw in that capacity, and throws on the acceptors the burden of proving the want of authority.

Duncan v. Barnard, 138.

4. Payment by the drawees of the original of a bill, drawn in duplicate payable to order, made under a forged endorsement, is no defence to an action by the payee, against the drawer, on the protest of the duplicate for non-acceptance. The payment made on the forged endorsement was at the risk of those who made it.

Brown v. Mechanics and Traders Bank, 143.

5. Where the holder of a promissory note, who had commenced an action against the makers, releases, on the trial, one of his co-debtors, *in solido*, in order to use his testimony, but without expressly reserving his recourse against the other, the latter will be discharged. C. C. 2199. And where in such a case, the release erroneously recites that a judgment had been obtained against the witness, from all liability under which it releases him, the fact that no judgment had been rendered is immaterial, the plaintiff evidently intending by releasing the supposed judgment to release the debt itself.

Harrison v. Poole, 202.

6. Where a bill had been lost, but the drawees promised the owner to pay the amount out of the proceeds of property expected to be received from the drawer, and sufficient property was afterwards received by them, the acceptance became absolute on the receipt of the property. The drawer could not countermand his order, after the acceptance, though before the de-

livery of the property, so as to discharge the acceptors, without the consent of the owner of the draft.

Northern Bank of Kentucky v. Leverich, 207.

7. Where a lost bill was accepted verbally, with a knowledge of the fact of its loss, and the acceptors have treated with the plaintiffs as the holders, proof by a witness of the acknowledgment of the payee that he had transferred the bill to the plaintiffs, is sufficient evidence of their title. In such a case slight evidence of title should suffice. *Per Curiam*: The acknowledgment of the payee is not hearsay, but rather the admission of a party to the bill. It would, perhaps, not be good evidence, because secondary, if the bill itself could have been produced. *Ib.*
8. Where a bill of exchange has not been protested, interest is due only from judicial demand. *Ib.*
9. No action can be maintained by the syndic of an insolvent estate to recover from a third person the amount of certain notes given for the price of property belonging to the estate, on the allegations that the notes were illegally obtained by defendant from a former syndic, with full knowledge that the latter had no authority to dispose of them, and that he did so in fraud of the creditors of the insolvent, and that the amount of the notes was received by the defendant, where it is neither alleged nor proved that the former syndic has failed to account for the proceeds of the notes nor that any account has ever been demanded of him. *Nicholson v. Jacobs*, 233.
10. Delivery of the evidence of a debt is a sufficient delivery of the possession of it. Notice to the debtor is necessary in some cases; but not in transfers of bills of exchange or notes payable to order previous to maturity, nor afterwards, but to prevent the parties bound from acquiring equities against the holder, to which they might be entitled if not notified.

United States v. Bank of United States, 262.

11. Though the negotiability of a note secured by mortgage is not restricted, so far as the personal responsibility of the parties to it is concerned, by its being *paraphed, ne varietur*, by the notary, for the purpose of identifying it, and though want of consideration cannot be opposed to a transferee, for a valuable consideration, before maturity, who received it in the usual course of business, the mortgage given to secure the note does not partake of its negotiability. It is merely assignable, and is subject to all the equities existing between the original parties. *Per Curiam*: A mortgage cannot be transferred to a third person, so as to give him any greater right than the mortgagee himself possessed. *Schmidt v. Frey*, 435.

See BANK, 1. BANK NOTE.

BILL OF LADING.

A bill of lading is only *prima facie* evidence of the truth of its contents, as between the parties. *Kirkman v. Bowman*, 246.

CAPIAS AD SATISFACIENDUM.

An executor is not a public officer within the meaning of the 14th sect. of the stat. of 10 February, 1841. The office of executor is a private trust. C. C. 2687, 2788. Since the stat. of 28 March, 1840, abolishing imprisonment for debt, a *ca. sa.* cannot be taken out on the return of a *fi. fa.* unsatisfied, against one who has converted to his own use money received by him as executor. *Ex parte Powell*, 95.

CHURCH OF ST. LOUIS OF NEW ORLEANS.

1. A vacancy in the office of Curate of the Church of St. Louis of New Orleans, cannot deprive the corporation of the faculty of suing. The Curate is an *ex officio* member of the board of Wardens, having but one vote, like any other member, in its deliberations. Stat. 7 March, 1816. 22 March, 1822. *Wardens of Church of St. Louis v. Blanc*, 51.
2. The statutes of 7 March, 1816, and 22 March, 1822, incorporating "The Wardens of the Church of St. Louis of New Orleans," do not give the wardens a right to appoint, in the theological sense of the word, a curate, but only to provide for his salary; but they have a perfect right to withhold all salary from any person whatever, and even to prevent one claiming to be curate from entering the church belonging to the corporation. *Per Curiam*: The legislature have not, and could not, authorize the wardens to interfere in matters of mere church discipline and doctrine, nor constitutionally declare what shall constitute a curate in the Catholic acceptation of the word, without interfering in matters of religious faith and worship, and taking a first step towards a church establishment by law. *Ib.*
3. The wardens of the church of St. Louis of New Orleans are authorized to administer the temporalities of the church, and are responsible only to their constituents for the manner in which they may administer them. They cannot compel the bishop to institute a curate of their appointment; nor is he, in any legal sense, subordinate to the wardens of any one of the churches within his diocese, in relation to his clerical functions. *Ib.*

CHURCH OF ST. PATRICK OF NEW ORLEANS.

The pews in the Roman Catholic Church of St. Patrick of New Orleans, are a distinct property from the church itself, or the ground upon which it stands. Stat. 16 February, 1842, s. 4. *City Bank v. McIntyre*, 467.

CODES, ARTICLES OF, CITED, EXPOUNDED. &c.

- I. *Code of 1808.*
- II. *Civil Code.*
- III. *Code of Practice.*

I. Code of 1808.

- Book III. tit. 5, arts. 36, 41, 42. Husband and wife. *Guérin v. Rivarde*, 457.
 — art. 53, § 3. — *Waggaman v. Zacharie*, 181.
 — arts. 88, 97. — *Guérin v. Rivarde*, 457.
 — tit. 6, art. 57. Sale. *Succession of Durnford*, 488.
 — tit. 10, art. 32. Interest. *Ib.*
 — — 19, art. 17, § 3. Husband and wife. *Waggaman v. Zacharie*, 181.
 — art. 60. Mortgage. *Macarty v. Landreaux*, 130.
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989. Interest on claims against successions. *Succession of Durnford*, 468.

See CRIMINAL LAW, 3.

COMPENSATION.

1. Where the curator of a succession claims in his account rendered to the Probate Court, an amount as damages for an eviction from land sold to him by the deceased, the allowance of which is opposed by the heirs, the fact of the right to damages being unliquidated, will be no obstacle to their being claimed and allowed in compensation of any amount due by the curator to the succession. It is not necessary that the damages should have been previously liquidated in an action by the curator against the heirs.

Succession of Durnford, 468.

2. Pleading in compensation should be favored, as it tends to prevent the unnecessary multiplication of suits. *Ib.*
3. Appellant, while acting as curator of a vacant succession, was evicted from land purchased by him from the deceased, and in his account he credited himself with the amount claimed as damages for the eviction. On an opposition by the heirs, on the ground of prescription: *Held*, that until they appeared and claimed the succession the curator was its legal representative, and could not enforce a demand, in his own favor, against it; and that to the extent of the funds in his hands, his claim was compensated, and might be opposed to the claims of the heirs by way of exception, even if incapable of being enforced in a direct action. *Ib.*

CONFLICT OF LAWS.

Personal property has no locality, and the law of the owner's domicile will, in all cases, determine the validity of its transfer or alienation, unless there be some positive or customary law of the country in which it is situated to the contrary. *United States v. Bank of United States*, 262.

CONSTITUTION.

1. In framing the State Constitution of 1812, it was deemed unnecessary to insert any restriction upon the power of the legislature on the subject of religious sentiments or worship, as it had already been settled, by solemn compact between the original states and the people of the territory, unalterable but by common consent, under the act of congress of 2d March, 1805, and in conformity with the ordinance of that body of 13th July, 1787, that religious freedom, in its broadest sense, should form the basis of all laws, constitutions and governments which forever after might be formed within said territory. *Wardens of Church of St. Louis v. Blanc*, 51.
2. A very strong case must be made out, to induce the court to declare a law

of a neighboring State unconstitutional, especially when it appears that the purpose of the law was in a great measure remedial.

Hyde v. Planters Bank, 416.

3. The court will not, in any case of serious doubt as to the constitutionality of a law, pronounce it void. *Ib.*
4. A court may propound interrogatories to an attorney against whom an attachment has been issued for a contempt, for the purpose of ascertaining whether he was the author of the petition containing the contemptuous language for which the attachment was issued, and his intention and motive in writing it; and the court may require an answer to them. Nor is this right a violation of the provision of the 18th sect. of the 6th article of the constitution, which declares, that "in criminal prosecutions no one shall be compelled to give evidence against himself." *State v. Soulé*, 500.

See CRIMINAL LAW, 4, 8, 17, 26, 54, 61, 84.

CONTEMPT OF COURT.

1. Where the evidence of a contempt of court is before the court, and the offence palpable, a rule to show cause why an attachment should not be issued, is unnecessary. In such a case an attachment may be issued in the first instance. The practice of taking a rule, arose out of a distinction between direct and consequential contempts, and was resorted to, where it became necessary to procure evidence not before the court.

State v. Soulé, 500.

2. A court may propound interrogatories to an attorney against whom an attachment has been issued for a contempt, for the purpose of ascertaining whether he was the author of the petition containing the contemptuous language for which the attachment was issued, and his intention and motive in writing it; and the court may require an answer to them. Nor is this right a violation of the provision of the 18th sect. of the 6th article of the constitution, which declares, that "in criminal prosecutions no one shall be compelled to give evidence against himself." *Ib.*
3. Contemptuous language contained in a petition, prepared by an attorney, for a rehearing of a cause pending before the Supreme Court, though filed with the clerk without a formal motion in court, will subject the offender to punishment for a contempt. Stat. 27 March, 1823, § 3. Such a petition must necessarily pass under the notice of the court, while in session; and, being required by art. 912 of the Code of Practice to be presented when the court is in session, in the absence of proof to the contrary it will be presumed that it was filed according to law. *Ib.*

CONTRACTS.

- I. *Parties to, and Consent necessary to Form.*
- II. *Execution and Proof.*

III. *Object and Consideration.*IV. *Interpretation.*V. *Joint, and In Solido.*VI. *Putting in Default.*VII. *Extinction.*I. *Parties to, and Consent necessary to Form.*

1. By the laws of Pennsylvania, a corporation is as competent as a natural person to make an assignment for the benefit of creditors, and to give a preference to one or more creditors, even after insolvency.

United States v. Bank of United States, 262.

2. It is no objection to the validity of an assignment for the benefit of creditors, under the laws of Pennsylvania, that it has not been expressly accepted by them. Acceptance will be presumed where it is shown that the assignment was for their benefit, and there is no stipulation for a release of the debts, nor any thing calculated to delay the creditors unreasonably. *Ib.*
3. The seventh section of the statute of the State of Mississippi, of the 21st February, 1840, which declares that, "it shall not be lawful for any bank in that State to transfer by endorsement, or otherwise, any notes, bills receivable, or other evidence of debt" did not impair any obligation contained in the charter of the Planters Bank of Mississippi, and is not a violation of any prohibition in the constitution of the United States. *Per Curiam*: The statute does not impair the obligation of any contract existing between the bank and its debtors. It modifies the capacity of the bank to cede to another the right to enforce such contracts. Nor can the bank be said to have any vested right to make such a transfer, resulting from any contract with the State. The capacity of contracting is generally within the power of the Legislature, in reference to future contracts; and remedies may be modified at its will. *Hyde v. Planters Bank*, 416.
4. No one can be said to have any vested right in any existing legal capacity in reference to any future contract, or advantage to result from that capacity. The capacity or incapacity of particular classes of persons to contract, or to inherit, depends upon the legislative will. *Ib.*
5. After a wife has obtained a separation of property, or a separation from bed and board carrying with it a separation of property, she may alienate any property formerly dotal, and, consequently may ratify any alienation made before the separation. Code of 1808, book 3, tit. 5, arts. 36, 41, 42, 97; tit. 20, art. 59. C. C. 2337, 2342, 2343, 2355, 2410, 2411, 2421, 3490. *Guérin v. Rivarée*, 457.

II. *Execution and Proof.*

6. Where in an action against a bank for the amount of notes alleged to have been destroyed by a fire which consumed the residence of plaintiff, the evidence leaves no doubt of the destruction of the notes, plaintiff will be entitled to a judgment for their amount on the condition of executing a bond,

with surety, to indemnify the bank, in case it should afterwards appear that the notes were not so destroyed. *Wade v. Canal and Banking Company*, 140.

7. Where the law requires a contract to be in writing, the power to execute it must be in writing also ; but where this is not required, the power may be in the simplest form, and the intention of the parties may be gathered, as much from their acts, as from their agreements.

Miller v. Canal and Banking Company, 236.

8. A claim on which suit has been instituted, or a judgment, may be transferred verbally. Such transfers may be proved by witnesses ; and where the amount of the claim, or judgment, exceeds five hundred dollars, the transfer may be established by one witness and corroborating circumstances.

Succession of Delassize, 259.

9. The notice to be given to the debtor to render the transfer of a claim or judgment binding upon third persons, is not required to be in any particular form. It is enough that it be such as to inform him of the fact that his former creditor is divested of all his rights to the thing assigned. Such notice may be proved like any other fact, according to the established rules of evidence ; and one witness is sufficient, whatever be the value of the claim or judgment transferred. *Ib.*

10. Delivery of the evidence of a debt is a sufficient delivery of the possession of it. Notice to the debtor is necessary in some cases ; but not in transfers of bills of exchange or notes payable to order previous to maturity, nor afterwards, but to prevent the parties bound from acquiring equities against the holder, to which they might be entitled if not notified.

United States v. Bank of United States, 262.

III. Object and Consideration.

11. The relation between a bishop and the wardens of a church implies no civil contract, and consequently gives rise to no civil obligation. It is not a "contract having for its object the gratification of any intellectual enjoyment, whether in religion, morality, or taste, or any convenience or other legal gratification," within the meaning of art. 1928, § 3, of the Civil Code.

Wardens of Church of St. Louis v. Blanc, 51.

12. When the law incapacitates persons from making certain contracts, the form of the contract cannot prevent their being allowed to prove the real nature of the transaction by parol evidence, or other proof going to contradict the contents of the acts, and tending to show that the parties intended to evade the provisions of the law ; as where a wife binds herself as principal, though the object was to bind her as surety, for the repayment of money received and used by her husband for his exclusive benefit.

Waggaman v. Zacharie, 181.

13. It was not the object of the English statute of 13th Eliz. ch. 5, to invalidate fair and *bona fide* transactions ; nor is every conveyance which has the effect of delaying or hindering creditors, in itself fraudulent. It must be devised "of malice, fraud, covin, collusion or guile," to bring it within the statute. *United States v. Bank of United States*, 262.

14. Conveyances or assignments to one or more creditors for the security or

- satisfaction of a debt due by the grantor, are, *prima facie*, good, within the stat. of 13th Eliz. ch. 5. *Ib.*
15. By the laws of Pennsylvania, a debtor, whether insolvent or not, may make either a partial or general assignment of property, either in possession or in action, for the benefit of his creditors, and may prefer one to another. *Ib.*
16. An assignment of property, real or personal, to trustees for the benefit of the creditors of the assignor, legal and valid by the laws of the State in which it was made, and accompanied by delivery, will be respected in this State. Such contracts must be governed by the law of the place where they were executed. C. C. 10. C. P. 13. *Ib.*
17. The assignments made by the Bank of the United States, for the benefit of certain of its creditors, on the 7th June, and 4th and 6th September, 1841, are valid under the laws of that State, and sufficient to transfer the property of the bank in this State. *Ib.*
18. Personal property has no locality, and the law of the owner's domicile will, in all cases, determine the validity of its transfer or alienation, unless there be some positive or customary law of the country in which it is situated to the contrary. *Ib.*
19. To entitle the United States under the act of Congress of 3 March, 1797, s. 5, to have any debt due to them first satisfied out of the property of an insolvent, where the latter has made a voluntary assignment for the benefit of his creditors, there must be an actual insolvency though not a declared one, and the assignment must have been a general one; but a party cannot by assigning all his property by different acts, defeat the priority of the United States, under the pretext of the assignments being partial. *Ib.*

IV. Interpretation.

20. Where a contract between a mortgagor and his mortgage creditors recites, that the former "shall be at liberty to sell any part of the mortgaged property, on paying to their agent a proportion of the purchase money equal to the proportion which the whole mortgaged security bears to the whole mortgage debt, and that thereupon their agent shall release the mortgage on the property so sold," the agent is authorized to release the mortgage only in the event of his having previously received the stipulated portion of the price of the part so sold. *Sewell v. Hennen*, 216.

V. Joint and In Solido.

21. There must be an express stipulation in a contract of sale, to render joint purchasers liable, *in solido*, or as sureties for each other, for the price. Such liability cannot be presumed. *Kohn v. Hall*, 149.

VI. Putting in default.

22. Where in the sale of property subject to mortgages, it was stipulated that the mortgages should be erased within the shortest delay, and that the notes given for the price should be deposited with the cashier of a certain bank,

there to remain till the erasure of the mortgages, when they were to be delivered to the vendor, a demand, made on the vendor personally at his domicile, to comply with his obligation to erase the mortgages, is sufficient to put him *in mora*. It was not necessary to make any demand of the cashier at the bank. *Sewell v. Hennen*, 216.

VII. Extinction.

23. One who suffers a judgment to be rendered against him, without pleading in compensation a debt which he might have opposed to his adversary's demand, does not thereby lose his right of action against the plaintiff for the amount of the debt; but he must institute a separate action therefor, before the court having jurisdiction over the plaintiff's domicile.

De Lizardi v. Hardaway, 22.

24. The destruction of a bank-note by fire, or otherwise, does not destroy the obligation of the bank to pay.

Wade v. Canal and Banking Company, 140.

CORPORATION.

1. A corporation cannot maintain an action for slander.

Wardens of Church of St. Louis v. Blanc, 51.

2. No express authority in the charter of a corporation is necessary to authorize it to make a promissory note, in the course of its legitimate business.

Brode v. Firemen's Insurance Company, 244.

3. A creditor who has obtained judgment against a corporation and issued execution thereon, may propound interrogatories to any stockholder, under the 13th section of the stat. of 20 March, 1839, to ascertain whether the whole amount of his stock-subscription has been paid in; and if any portion be unpaid, it may be seized by the creditor in satisfaction, as far as it will go, of his judgment. The fact of other stockholders having paid less than their proportion, is a matter to be settled between the stockholders themselves. *Ib.*

4. By the laws of Pennsylvania, a corporation is as competent as a natural person to make an assignment for the benefit of creditors, and to give a preference to one or more creditors, even after insolvency.

United States v. Bank of the United States, 262.

COURTS.

Where the curator of a succession claims in his account rendered to the Probate Court, an amount as damages for an eviction from land sold to him by the deceased, the allowance of which is opposed by the heirs, that court has jurisdiction of the questions whether there was a warranty and eviction, and as to the amount of the damage. A Probate Court may inquire into the title to real estate, when necessary to enforce its admitted jurisdiction. Nor will the fact of the right to damages being unliquidated, be any obstacle to their being claimed and allowed in compensation of any amount due by the

curator to the succession. It is not necessary that the damages should have been previously liquidated in an action by the curator against the heirs. *Succession of Durnford*, 488.

See BANKRUPT, 1, 2, 3, 5.

CRIMINAL LAW.

- I. *English Criminal Law, how far adopted.*
- II. *Statutes relative to Criminal Offences, and Interpretation thereof.*
- III. *Felony.*
- IV. *Homicide.*
- V. *Rape.*
- VI. *Assault with Dangerous Weapon, or with Intent to Kill.*
- VII. *Larceny*
- VIII. *Forgery.*
- IX. *Perjury.*
- X. *Prosecutions by Indictment.*
- XI. *Plea of Auterfoits Acquit.*
- XII. *Nolle Prosequi.*
- XIII. *Jury and Verdict.*
- XIV. *Evidence.*
- XV. *New Trial.*
- XVI. *Arrest of Judgment.*
- XVII. *Judgment.*
- XVIII. *Appeal.*

I. *English Criminal Law, how far adopted.*

1. The Legislature in providing by the sec. 33 of the stat. of 4 May, 1805, that "all the crimes, offences, and misdemeanors hereinbefore named, shall be taken, intended and construed according to and in conformity with the law of England; and the forms of indictment (divested however of unnecessary prolixity,) the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of the said crimes, offences and misdemeanors, changing what ought to be changed, shall be, except as is by this act otherwise provided for, according to the said common law," must be understood as having adopted that system of law as it existed in 1805, modified, explained and perfected by statutory enactments, so far as those enactments are not inconsistent with the peculiar character and genius of our institutions. *State v. McCoy*, 545.

II. *Statutes relative to Criminal Offences, and Interpretation thereof.*

2. The acts of the Legislature, in 1803, were passed in both the English and French languages, both being texts ; and they must be construed the one by the other—as parts of a whole, and not as distinct acts or expressions of the legislative will. *State v. Moore*, 518.
3. The Code of Practice has no application to criminal prosecutions. *Ib.*
4. Anterior to the constitution, the laws of the territory were passed and promulgated in both the English and French languages ; and the act in one language was entitled to as much respect as in the other ; but that instrument having provided, by the 15th sect. of the 6th art., that “all laws that may be passed by the Legislature, shall be promulgated and preserved in the language in which the constitution of the United States is written,” in the construction of statutes passed since its adoption, the language of the English text, when unambiguous, cannot be controlled by the French translation. *State v. Mir*, 549.

III. *Felony.*

5. The term *felony* is unknown to the laws of this State. *State v. Charlot*, 529.

IV. *Homicide.*

6. The killing a slave, like that of a free person, may be either murder or manslaughter according to the circumstances of the case ; and both offences are punishable by the laws of this State. The 16th section of the stat. 7 June, 1806, was enacted for the purpose of removing all doubt on this subject. *State v. Moore*, 518.
7. The second section of the stat. of 20 March, 1818, punishing the crime of manslaughter, applies to the offence when committed on a slave, as well as on a free person. *Ib.*
8. The provision of the first section of the stat. of 20 March, 1818, that on trials for murder, the jury may find the prisoner guilty of manslaughter, is not inconsistent with the 18th sect. of the 6th art. of the constitution. *Ib.*
9. Where the mortal stroke by which a murder was effected, was given in one parish and the death occurred in another parish in this State, the crime must be prosecuted in the parish in which the death occurred. But where the mortal stroke was given in this State, but the death occurred in another State, the crime may be inquired of in the parish where the stroke was inflicted. *State v. McCoy*, 545.

See 23, 24, 26, 27, 28, 35, 40, 46, 48, 73, 75, *infra*.

V. *Rape.*

10. A slave may be convicted of the crime of rape, under the 7th sect. of the stat. of 7 June, 1806, on proof of his having attempted to have carnal intercourse with a white female child under ten years of age. *State v. Bill*, 527.

VI. *Assault with Dangerous Weapon, or with Intent to Kill.*

11. The 5th sect. of the stat. of 7 February, 1829, which declares, that "whoever shall, with a dangerous weapon, or with intent to kill, inflict a wound less than mayhem, upon another, shall, on conviction, be imprisoned." &c., was intended to provide punishment for two distinct offences: that of assaulting with a dangerous weapon, and that of assaulting with intent to kill. The language is free from ambiguity, and cannot be affected by the French translation. *State v. Mix*, 549.

See 25, *infra*.

VII. *Larceny.*

12. In a prosecution for larceny, proof that the offence was committed on the precise day charged in the indictment is unnecessary. *State v. Charlot*, 529.
13. In a prosecution for larceny, proof that the offence was committed on the day charged in the indictment, is not necessary. It is sufficient if it be shown to have been committed at any time within a year previous to the finding of the indictment. *State v. Clark*, 533.
14. Where one has been notified of a design to steal his goods, which he neither originated nor suggested, he may, in order to detect the thief, direct a servant or agent, to encourage the design, and afford facilities for the completion of the crime; and such facilities will not affect the criminality of the thief. *State v. Duncan*, 562.

See 19, 62, 68, *infra*.

VIII. *Forgery.*

See 20, 21, *infra*.

IX. *Perjury.*

See 30, 39, *infra*.

X. *Prosecutions by Indictment.*

15. The incompetency of some of the grand jurors by whom a bill of indictment has been found, is not cured by the omission to urge the objection on the first day of the term of the District Courts in the country parishes. The 5th sect. of the stat. of 6 March, 1840, applies only to the formalities to be observed in the summoning, formation, and drawing of the grand jury, not to the want of qualification of any member of the jury. But an objection founded on such want of qualification is inadmissible on a motion in arrest of judgment, where the party is confined to matters apparent on the record. Nor will a demurrer on the part of the State to a motion in arrest of judgment, made on the ground of such want of qualification, though amounting to an admission of the want of qualification, obviate the objection that the error complained of was not apparent on the face of the record.

State v. Nolan, 513.

16. An indictment which charges an offence to have been committed "at the parish of C——" is sufficient. The omission to designate a particular place within the parish, and the use of the word *at* for *in*, are immaterial. The offence is properly charged to have been committed within the *parish* instead of within a county. *Ib.*
17. An indictment commencing "State of Louisiana, Parish of, &c." which recites that, "The grand jurors for the State of Louisiana, &c., acting in the name and by the authority of the State," &c., is a sufficient compliance with sect. 6, of art. 4 of the constitution, requiring all prosecutions to be carried on in the name and by the authority of the State.
State v. Moore, 518.
18. It is sufficient in an indictment, to charge that an offence was committed in a particular parish; no further designation of the place is necessary. An averment that the offence was committed *at a parish* is equivalent to *in the parish*. *Ib.*
19. In an indictment for larceny of a cow, a description of the animal by its kind, color and sex is sufficient. The sufficiency of such a description is not affected by any thing in the stat. of 20 March, 1827, relative to the branding of animals in certain parishes. *State v. Charlot*, 529.
20. As a general principle, an indictment for forgery or counterfeiting, or uttering forged or counterfeited bills, must contain an exact copy or recital of the bill, where the prosecuting attorney attempts to set it out by its tenor; but where, from the difficulty of ascertaining a particular word, the prosecuting attorney attempted to make a *fac-simile* of it, the indictment will be good. *State v. Sheldon*, 540.
21. In an indictment for uttering a forged bank-bill, though the prosecuting officer attempted to set it out by its tenor, he is not bound to set forth words written in the margin of the bill; and where, in attempting to do so, the indictment recites that the bill contained the words *cinquante piastres* on the right hand of the vignette, while it actually contained the words *cinquante gourdes*, the statement will be regarded as surplusage, and the variation as immaterial. *Per Curiam*: In indictments for forgery it is unnecessary to set forth the ornamental parts of the bill, as the devices, mottoes, &c. *Ib.*
22. It is not necessary that all the counts of an indictment should be written upon the same sheet of paper, nor when on separate sheets, that they should be attached together. *State v. Lennon*, 543.
23. It is unnecessary in an indictment for murder to state the length, breadth, or depth of the wounds. The term *mortal* is indispensable in describing the bruise or wound; but when so described, an adequate cause of death is assigned, which will be supported by evidence of any deadly wound or bruise. It has never been required to prove either a wound or bruise as laid.
State v. McCoy, 545.
24. Where an indictment for murder alleges the infliction of "several mortal bruises and wounds in and upon the right side of the head, also in and upon the stomach, back and sides" of the deceased, it is a sufficient description both of the character and locality of the wounds. *Ib.*

25. An indictment which charges a prisoner with "having unlawfully and feloniously, with a certain dangerous weapon, commonly called a life-protector, assaulted," &c., contains a sufficient description of the weapon, with which the assault was alleged to have been committed, using the very words of the statute of 7 February, 1829, s. 5. The use of the word *feloniously*, cannot vitiate the indictment. It may be rejected as surplusage.
State v. Mir, 549.
26. The omission, in an indictment for murder, of one or more letters in a word, which does not change the word into another of a different signification, will not vitiate the indictment; nor will it be fatal under the 15th sect. of the 6th art. of the constitution, which requires all judicial proceedings to be conducted in the language of the constitution, that such omission changes the word to a French term of the same meaning as that intended to be used, as where the indictment charges that the mortal blow caused "an *extravasation* (for extravasation) of blood, &c." *State v. Hornsby*, 554.
27. The omission, in an indictment for murder, of one or more letters in a word, where the whole word might be rejected as surplusage, is immaterial.
Ib.
28. It is unnecessary, in an indictment for murder, to state the length, breadth, or depth of the wound. The term mortal is indispensable in describing the wound or bruise, but when so described and an adequate cause of death is assigned, which will be supported by evidence of any deadly wound or bruise, it has never been required to prove either a wound or a bruise as laid. *Ib.*
29. The words "a true bill," as well as the capacity of the foreman, may be endorsed on an indictment by any person, under the direction of the grand jury. It is only necessary, that the finding should be signed by the foreman.
State v. Duncan, 562.
30. Where in a prosecution for perjury, the indictment charges that the perjury consisted in the prisoner's falsely swearing that "*shortly after* the assault and battery committed by P. on the body of D., M. took the said D. by the collar, threw him down and kicked him;" and negatives the truth of the oath by averring, that "in truth and in fact the said M., *after* the assault and battery committed by P. upon the body of the late D., did not take the said D. by the collar, nor throw him down, nor kick him, nor commit any battery on him," it is sufficient. It was not material to the issue to negative any assault or violence to the person of D. *anterior* to the assault and battery committed by P. *State v. Brown*, 566.
31. It is not necessary, either in England or in this State to mention in an indictment the name of the court in which it was found; consequently, where the style of the court is inaccurately given in the commencement and statement of an indictment, it will be disregarded as surplusage.
State v. Kennedy, 591.
32. The caption forms no part of an indictment. It is a separate act, not submitted to nor acted on by the grand jury, preferring no charge against the accused, and never appears on the record till the bill has been found, and

generally not until the indictment has been removed for trial to a higher tribunal, by writ of error or *certiorari*. Its principal object is to show that the inferior tribunal had jurisdiction of the offence, and owes its origin to the peculiar organization of the English courts. In this State, where the same court before which an indictment is found must try it, no caption is necessary or required. *Ib.*

33. In an indictment the venue, that is, the parish in which the offence was committed, must be stated, in order that the court may know whether it has jurisdiction. *Ib.*
34. In indictments for offences termed felonies at common law, the time when the offence was committed must be stated with such certainty that no doubt can be entertained of the period really intended. Any uncertainty in the averment of time and place will vitiate the indictment. This averment must be repeated as to every issuable fact; when they have been once set forth with certainty, they may, in every subsequent averment, be referred to by the words *then* and *there*, which are equivalent to a repetition of the time and place. *Ib.*
35. In an indictment for murder, the material facts are the mortal stroke and consequent death, and the death must appear to have occurred within a year and a day after the mortal stroke. The averment of each of these material facts must be accompanied by an allegation of a certain time and place: thus, where an indictment for murder, after stating the mortal blow, with the usual averments of time and place, proceeds: "Of which mortal wound so given by the said K. with the deadly weapon aforesaid, to the said W., the said W. did then and there suffer and languish and languishing did live, and, a few hours after did die of the said mortal wound," the averment of the time and place of the death is insufficient; and the defect is not cured by a verdict. *Per Curiam*: The words "*then and there*" immediately precede and refer to the words "languished and languishing did live," and not to the allegation "and a few hours after did die." The copulative *and* is insufficient to connect the time and place with the death. The facts of time and place must be precisely and distinctly stated; they cannot be inferred. Nor will the averment in the conclusion of a correct time and place of death, cure this defect; on the contrary, it will render it repugnant to the statement. *Ib.*
36. The stat. of 4 May, 1845, s. 33, which provides that "the forms of indictments, (divested, however, of unnecessary prolixity,) the method of trial, rules of evidence and all other proceedings whatsoever in the prosecution of said crimes, offences and misdemeanors, changing what ought to be changed, shall be, except as otherwise provided for, according to the common law," did not intend to confer upon the courts authority to legislate on the subject of criminal proceedings or the framing of indictments, but merely to direct prosecuting officers to omit those prolixities acknowledged to be such at common law, and unnecessary, though habitually inserted in indictments; and the changes directed to be made, are those necessary to make our proceedings conform to our own laws and form of government. What-

ever has been determined to be an essential averment in an indictment at common law, will be deemed necessary here, unless a statute of the State has removed the reason, and with it the necessity for the allegation. *Ib.*

37. The incompetency of one of the grand jurors by whom a bill of indictment has been found, is not cured by the omission to urge the objection on the first day of the term of the district courts in the country parishes. The 5th sec. of the stat. of 6 March, 1840, applies only to the formalities to be observed in the summoning, formation and drawing of the grand jury, and not to the want of qualification in any of its members. *State v. Jones*, 616.
38. The incompetency of any one member of a grand jury by whom an indictment has been found, will vitiate the whole proceeding, no matter how many unexceptionable jurors joined with him in finding it. *Ib.*

XI. *Plea of Auterfoits Acquit.*

39. On a trial for perjury, the prosecuting attorney, after opening the case on the merits and being followed by the counsel for the prisoner, discovered a defect in the indictment, and moved the court for leave to enter a *nolle prosequi*, which was granted, and the jury was discharged and the prisoner remanded to jail. Another indictment having been found against the prisoner for the same offence : *Held*, that no verdict of guilty or not guilty having been rendered, there was no trial ; and that the entering of the *nolle prosequi*, and the discharge of the jury without the consent of the prisoner, could not support a plea of *auterfoits acquit*. *Per Curiam* : To render the plea of a former acquittal a bar, it must be a legal acquittal, by judgment upon trial, for substantially the same offence, by a verdict of a petit jury.
- State v. Brown*, 566.

40. Where on an indictment for murder, the jury find the prisoner guilty of manslaughter, and a new trial is awarded to the latter, the prosecuting attorney may enter a *nolle prosequi* as to the charge of murder, and prefer a new indictment for manslaughter, without thereby acquitting the prisoner of the last offence. But the verdict of manslaughter is a virtual acquittal of the charge of murder, for which the prisoner cannot be again tried.

State v. Hornsby, 583.

41. To render a plea of a former acquittal a bar, it must be a legal acquittal, by judgment upon trial, for substantially the same offence, by a verdict of a petit jury. *Ib.*

XII. *Nolle Prosequi.*

42. A *nolle prosequi* amounts neither to an acquittal nor pardon. It is simply the discharge of the particular indictment as to which it is entered, and is no bar to a future indictment for the same offence. *State v. Hornsby*, 583.
43. At any time before a jury is empanelled, the prosecuting attorney may enter a *nolle prosequi*, without the consent of the court or of the accused ; but where the jury has been charged with the trial of a case, this right cannot be exercised against the will of the court, which will not consent to its

exercise where the defence appears ample, or the motion not likely to promote the ends of justice. *Ib.*

XIII. Jury and Verdict.

44. In criminal proceedings no foreman is appointed to the jury.
State v. Nolan, 513. *State v. Moore*, 518.
45. In criminal proceedings it is not necessary that the verdict should be signed. *State v. Nolan*, 513.
46. Where on an indictment for murder the jury find the prisoner guilty of manslaughter, it is not necessary that the verdict should expressly negative the murder, nor declare whether the manslaughter was voluntary or involuntary, the law making no difference in the punishment of voluntary or involuntary manslaughter. *State v. Moore*, 518.
47. In criminal proceedings it is not necessary that the verdict should be written upon the indictment or signed by the foreman of the jury. It is sufficient that a verdict be delivered orally, in open court, when it is recorded.
Ib.
48. As every indictment for murder contains, virtually an accusation of manslaughter, a verdict on such an indictment, finding the prisoner "guilty of manslaughter in manner and form as charged" is strictly correct. *Ib.*
49. Slaves charged with capital offences are entitled to be tried by an impartial jury. They have no right to challenge a juror peremptorily; but their right to challenge for cause is the same as that of free persons.
State v. George, 535.
50. To disqualify a juror on the ground of his having formed an opinion as to the guilt of the accused, his opinion must have been deliberately formed. Light impressions, which may be fairly supposed to yield to the testimony that may be offered, and which leave the mind open to a fair consideration of it, are no sufficient objection to a juror; but those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, and which will combat and resist its force, constitute a sufficient objection. *Ib.*
51. Where the extent of the punishment of an offence is left to the discretion of the jury, the fact that one offered as a juror has made up his mind as to the measure of punishment which should be awarded to the accused in case of conviction, is a sufficient cause to reject him. *Ib.*
52. Where on the trial of a slave charged with a capital offence, the parish judge remained with the jury, after they had retired to deliberate on their verdict, in order to read to them the testimony, which he had reduced to writing so illegibly that they were unable to decipher it, but afterwards withdrew, and subsequently returned, at their request, and wrote out their verdict, these acts, though irregular, will not vitiate a verdict, where it does not appear that the judge availed himself of his presence among the jury to participate in the proceedings. *Per Curiam*: The jury should have been brought into court, and the testimony read to them there; and, when pre-

- pared to render their verdict, if unable to write it themselves, it should have been written in open court, by the clerk or judge, under their direction. *Ib.*
53. In capital cases a jury should not be permitted to separate, after they have been sworn, whether the prisoner consent or not. In cases not capital, courts may, in their discretion, permit the jury to separate, before they have received the charge of the court, but not after the charge has been given. In cases not capital, misconduct on the part of the jury, where they have been permitted to separate, will cause their verdict to be set aside; in capital cases, where they have separated, misconduct and abuse will always be presumed, and a new trial ordered. *State v. Hornsby, 554.*
54. The stat. of 26 January, 1844, exempting the inhabitants of the parish of Rapides, residing on the west side of the river Calcasieu and bayou Sépa, from serving as jurors, cannot be considered as infringing the right secured by sect. 18 of art. 6 of the constitution to persons prosecuted in that parish by indictment or information, of having a trial by an impartial jury of *the vicinage*. *State v. Jones, 573.*
55. Where a jury in a criminal case is put in charge of a sheriff or his deputy, it is not necessary that either should be specially sworn to keep them together, and not to speak to them except to ask them if they are agreed, nor to permit others to speak to them. The duty of the sheriff, or his deputy, in such a case is an official one, which they having been already sworn to perform, no additional oath is necessary. *State v. Kennedy, 590.*
56. Where on a trial for murder, a person offered to be sworn as a juror answers on his *voir dire*, that he has conscientious scruples against finding a verdict of guilty in any case involving the life of the accused, he may, on the principles of the common law, independently of any statutory enactment, be set aside for cause. *Ib.*
57. Where twelve months have not elapsed between the time when a juror first determined to fix his residence in this State, and the date of the formation of the *venue*, he is incompetent, not having resided twelve months within the State, as required by law. The twelve months commence only from the date of the determination to reside within the State, though the party may have been within it for many months previously. *Ib.*
58. An objection to a juror on account of want of residence should be made when the juror is offered to be sworn. Where no inquiry is made of the juror on his *voir dire*, as to his residence, any objection on that account will be too late on a motion for a new trial. *Aliter*, when, on being interrogated, he states that he possesses any qualification, and the statement is afterwards found to be false. *Ib.*

XIV. Evidence.

59. The statutes of 7 June, 1806, (s. 1.) and of 19 February, 1835, (s. 1.) which prescribe the mode of trial of slaves charged with capital offences, requiring that the judge and freeholders shall be of the parish in which the offence was committed, the venue constitutes, in such prosecutions, as in

other ordinary criminal prosecutions, a substantive charge, and it must be specially proved. *State v. George*, 535.

60. Where one charged with a criminal offence is described as a slave, and with the assistance of his owner, submits, without objection, to be tried as such, it is such an admission of his condition, as will prevent him from requiring the judge to charge the jury that the fact of his being a slave should be proved to warrant a verdict of guilty. *Per Curiam*: It was such an admission of his condition as he could not contradict at that stage of the prosecution. He should have made the issue before going to trial on the merits, or have availed himself of it after verdict. *Ib.*
61. Sect. 18, art. 6, of the constitution, having provided that, "in all criminal prosecutions the accused shall have the right of meeting the witnesses face to face and of having compulsory process for obtaining witnesses in his favor," the failure of the Legislature to invest the courts of original criminal jurisdiction with power to coerce the attendance of witnesses residing within the State beyond the limits of their respective territorial jurisdictions, cannot deprive the accused of his right, under the constitution, of having his witnesses heard, whether found within or beyond such limits; and as he is entitled to a speedy trial, (Const. art. 6, s. 18,) and as the right of being confronted with the witnesses against him is a personal privilege which the accused may waive, he may require the testimony of witnesses in his favor, residing within the State but beyond the jurisdiction of the court, to be taken under commission. *State v. Hornsby*, 554.
62. In prosecutions for larceny, or other criminal proceedings of the same kind, the prisoner cannot require the testimony to be reduced to writing.
State v. Duncan, 562.
63. A question which does not indicate the answer expected from the witness, but merely directs his attention to the subject in relation to which he is to testify, is not a leading one. A leading question is one which suggests to the witness the answer he is to deliver. *Ib.*
64. It is the universal practice in this State, both in criminal and civil proceedings, to permit a witness after having been examined in chief, consigned and cross-examined, to be again examined by the party by whom he was introduced, upon points touching which he had not before testified, or to be subsequently recalled and interrogated in relation to material facts, not before elicited or referred to, either from inadvertence or ignorance of their being within the knowledge of the witness. *Ib.*
65. The declarations of third persons, though not under oath, are admissible in evidence, where they form a part of the *res gesta*. Thus, on an indictment for horse-stealing, a witness may state, "that on a certain night a negro servant came to witness and told him, that a man had offered him a dollar to get him a horse, and that the negro promised to steal the horse and take him to the man; and that witness told the negro he could do as he had promised;" the statement is admissible to show the circumstances under which the horse was sent, and the agency of the witness in sending him. *Ib.*

See 10, 12, 13, 23, *supra*.

XV. *New Trial.*

66. New trials may be granted in criminal prosecutions.

State v. Charlot, 529. *State v. George*, 535. *State v. Hornsby*, 583.

67. A new trial will not be granted in any criminal case on the ground of newly discovered evidence, where such evidence is irrelevant or unimportant, or the prisoner must have been aware of its existence before the trial, and was guilty of gross negligence in not procuring it.

State v. Charlot, 529.

68. Evidence discovered since the trial of one found guilty of larceny, which neither disproves nor has any tendency to disprove the main fact found by the jury, that the accused was guilty of larceny within twelve months previous to the finding of the indictment, cannot entitle the prisoner to a new trial. *State v. Clark*, 533.

69. Where a new trial has been improperly refused by the court of the first instance, it will be ordered by the Court of Errors and Appeals.

State v. George, 535.

70. Where, on a motion for a new trial, in a criminal prosecution on the ground of the discovery of an important witness since the trial, the name of the witness is not disclosed in the affidavit, the motion must be overruled.

State v. Lennon, 543.

71. To entitle the prisoner to a new trial in a criminal prosecution, on the ground of evidence having been discovered since the trial, the newly discovered evidence must be such as would probably produce a different verdict. *State v. Hornsby*, 554.

72. The effect of a new trial in a criminal prosecution is merely to grant a rehearing of the case before another jury, with as little prejudice to either party as if it had never been heard before. No advantage is to be taken of the former verdict on the one side, nor of the order awarding a new trial on the other. *State v. Hornsby*, 583.

73. A new trial will not be granted, in a prosecution for murder, on the ground of the jury having been permitted to communicate with persons not members of their body, where they were kept together in apartments provided for their use during the adjournment of the court, and the few words exchanged by the jurors with persons not of their body, were with sworn officers of the court, brought unavoidably in contact with them, and did not relate to the trial, nor were of a character to produce the slightest effect upon their decision. *State v. Kennedy*, 590.

74. In applications for a new trial in criminal cases, on the ground of newly discovered evidence, it must be shown that there has been reasonable diligence to procure the evidence, that it has been discovered since the trial, and is material, and that it would probably produce a different verdict, if a new trial be granted. *Ib.*

75. In a prosecution for murder where the court is satisfied that the jury cannot agree in a verdict, it may discharge them, though the prisoner oppose it, and may direct a trial before another jury. *State v. Ferguson*, 613.

See 53, 58, *Infra*.

XVI. *Arrest of Judgment.*

See 15, *Supra*.

XVII. *Judgment.*

76. A judgment condemning a criminal to three years imprisonment at hard labor, and to pay the costs of the prosecution or to remain imprisoned one day longer, is not illegal in a case in which the three years and one day do not exceed the maximum of punishment allowed by law.

State v. Nolan, 513.

XVIII. *Appeal.*

77. By the statute of 6 April, 1843, creating the Court of Errors and Appeals, the court is empowered to grant relief against decisions of the inferior tribunals in criminal cases, upon questions confided to their legal discretion. But to enable the court to give such relief, a case must be stated and embodied in the bill of exceptions taken to the decision below, in order that its correctness or incorrectness may be ascertained, unless the alleged error be apparent on the face of the record. *State v. Charlot*, 529.
78. Where the record of appeal from a judgment in a criminal prosecution, furnishes no means of judging of the relevancy or importance of testimony, on account of the absence of which the prisoner prayed for a continuance which was refused below, the judgment of the lower court will not be interfered with. *Ib.*
79. The Court of Errors and Appeals has jurisdiction of questions arising out of criminal prosecutions under the provisions of the statute of 7 June, 1806, known as the Black Code. Stat. 6 April, 1843, s. 5.
- State v. George*, 535.
80. On an appeal by one found guilty of uttering a counterfeit bank-bill, taken from a judgment refusing a new trial, asked for on the ground that there was no legal evidence to show that the prisoner had any knowledge of the character of the bank-bill upon which the indictment was framed, the verdict of the jury will be considered conclusive as to the sufficiency of the proof. *Per Curiam*: This court cannot inquire into the correctness of the verdict on this point. The *scienter* was a matter of fact for the jury to find.
- State v. Sheldon*, 540.
81. Where the record of appeal in a criminal case contains neither bill of exceptions, nor assignment of errors apparent on the face of the record, the case cannot be examined. Stat. 6 April, 1843, § 2.
- State v. Major*, 553. *State v. Adams*, 571.
82. In an appeal from a judgment in a criminal prosecution, the appellant must spread upon the record so much of the testimony as may be necessary to enable the court to which the appeal is taken to determine, with certainty, whether any error has been committed by the court of original jurisdiction. This may be done by embodying a synopsis of the testimony in a bill of exceptions. *State v. Adams*, 571.

83. The statute of 6 April, 1843, creating the Court of Errors and Appeals, authorizes an appeal on behalf of the State, from a judgment quashing an indictment for an assault with a dangerous weapon, and with intent to kill. Sec. 2. *State v. Jones*, 573.
84. The statute of 6 April, 1843, establishing the Court of Errors and Appeals does not violate any provision of the constitution. It is not inconsistent with either the first or fourth sections of the fourth article of the constitution. The court established by the act of 1843, though a court of the last resort, is not a *Supreme Court* within the meaning of sec. 1, of art. 4 of that instrument. The term *supreme*, as used in that section, was intended to designate the independence of the court of any legislative control. *Ib.*
85. The right of appeal arises in a criminal case only after verdict, judgment and sentence. Any appeal taken previously will be dismissed, on a motion to that effect. *State v. Hornsby*, 583.

CURATOR.

See SUCCESSIONS.

DAYS OF PUBLIC REST.

Civil process may be served on the twenty-fifth of December. That day is not mentioned in art. 207 of the Code of Practice, among those on which no such process can be served. *Irish v. Wright*, 428.

DEFAULT.

See CONTRACTS, VI. SALE, 14.

DOMICIL.

One who has given notice in writing of his intention to become a resident of the State to the parish judge of the parish in which he proposes to reside, but who has not resided within it one year without interruption, not having acquired a residence in the manner authorized by the stats. of 7 March, 1816, s. 2, and 16 March, 1818, s. 1, must be considered as "*not domiciliated in the State*" within the meaning of art. 2512 of the Civil Code; and, in case of his absence from the State within a year from the date of a sale made by him, the prescription of one year against redhibitory actions will be suspended as to him during his absence. *Rist v. Hagan*, 106.

See CRIMINAL LAW, 57, 58.

DOTAL PROPERTY.

See HUSBAND AND WIFE, 5, 6.

ECCLESIASTICAL LAW.

1. The Spanish ecclesiastical laws have no longer any force in this State.
Wardens of Church of St. Louis v. Blanc, 51.
2. The right to nominate a curate, or the *jus patronatus*, of the Spanish law, is abrogated in this State. *Ib.*

EVIDENCE.

- I. *When to be introduced.*
 - II. *Presumption.*
 - III. *Competency of Witness.*
 - IV. *Judicial Records and Proceedings.*
 - V. *Certificate of a Recorder of Mortgages.*
 - VI. *Bill of Lading.*
 - VII. *Parol Evidence to Contradict or Enlarge Written Instruments.*
 - VIII. *Admissibility of Evidence under the Pleadings.*
 - IX. *Proof of Agreement to pay Interest.*
 - X. *Proof of Sale of Immovables.*
 - XI. *Proof of Transfer of Claims or Judgments.*
 - XII. *Evidence of Parties.*
 - XIII. *Evidence in Particular Actions.*
 1. *In Actions on Bills of Exchange and Promissory Notes.*
 2. *In Actions on Policies of Insurance.*
 3. *In Proceedings for a Contempt.*
 4. *In Proceedings under Stat. of 10 March, 1834, for Homologation of Sales.*
- (*In Criminal Prosecutions*, See CRIMINAL LAW, 10, 12, 13, 23, XIV.)

I. *When to be Introduced.*

1. In an action on a contract alleged to have been executed by an agent of the defendants, the latter cannot object to the contract's being read in evidence on the ground that the authority of the agent had not been proved; but if no authority be afterwards shown, or none can be properly inferred from the evidence, the contract will be of no avail.

Miller v. Canal and Banking Company, 236.

II. *Presumption.*

2. The purchaser of a slave, who institutes a redhibitory action on the ground that the slave is a runaway, is not bound to prove that the vice existed before the sale, when discovered within two months thereafter; but this presumption ceases where it is proved that unusual punishments have been inflicted on the slave. Stat. 2 January, 1834, s. 3. *Rist v. Hagan*, 106.

III. Competency of Witness.

3. The mere incompetency of a person to testify as a witness in a cause, will not authorize a court to exclude from its consideration the legal inferences which might otherwise be drawn from acts done by him, at a time when it is impossible to suppose that any of the parties were manufacturing evidence for the cause. *St. Martin v. Creditors*, 1.
4. An agent by whom a contract has been executed, and who has been released by the plaintiff from any liability to him, may be examined as a witness in an action on the contract, to prove the extent of his powers.

Miller v. Canal and Banking Company, 236.

IV. Judicial Records and Proceedings.

5. A judgment rendered in an action against the master and owners of a steamer, for damages on the ground of injury sustained by plaintiff through the fault of those in command of the steamer, is conclusive as to such fault in a subsequent action between the master and one of the owners, to recover from another his proportion of the damages, all of which had been paid by the former. *Howrin v. Clark*, 27.
6. A judgment of nonsuit in a prosecution in the name of the city, instituted before a magistrate for the recovery of the fine imposed for a disturbance of the public peace, is not conclusive evidence, in an action for false imprisonment, against the parties at whose instance the plaintiff was arrested.

Gerber v. Viosca, 150.

7. The statement in the return of a sheriff on a *fi. fa.* under which property has been sold, that notice of the seizure was sent by mail to the sheriff of the parish in which the owner of the property resided to be served, is not alone sufficient evidence of the service of notice.

Lamorandier v. Meyer, 152.

V. Certificate of a Recorder of Mortgages.

8. The certificate of a recorder of mortgages as to the existence or erasure of mortgages, is only *prima facie* evidence of the facts stated in it.

Macarty v. Landreaux, 130.

VI. Bill of Lading.

9. A bill of lading is only *prima facie* evidence of the truth of its contents, as between the parties. *Kirkman v. Bowman*, 246.

VII. Parol Evidence to Contradict or Enlarge Written Instruments.

10. When the law incapacitates persons from making certain contracts, the form of the contract cannot prevent their being allowed to prove the real nature of the transaction by parol evidence, or other proof going to contradict the contents of the acts, and tending to show that the parties intended to evade the provisions of the law ; as where a wife binds herself as princi-

pal, though the object was to bind her as surety, for the repayment of money received and used by her husband for his exclusive benefit.

La Gourgue v. Summers, 181.

11. A mandate given in writing, in express terms, cannot be enlarged by parol evidence. *Miller v. Canal and Banking Company*, 236.

VIII. *Admissibility of Evidence under the Pleadings.*

12. In an action against a sheriff for damages, for the illegal seizure and removal of plaintiff's furniture, under an execution against a third person, evidence is admissible, under a general allegation that the furniture was removed against plaintiff's earnest remonstrances, to show, in aggravation of damages, the manner in which the furniture was removed, and all the concomitant circumstances. *Pascal v. Ducros*, 112.

IX. *Proof of Agreement to pay Interest.*

13. Under the Code of 1808, conventional interest could not be recovered, unless the amount had been fixed in writing. Testimonial proof was inadmissible, to prove an agreement to pay such interest. Book 3, tit. 10, art. 32.
Succession of Durnford, 488.
14. Where an authentic act acknowledging a balance to be due, is silent as to the payment of interest, receipts signed by the creditor, acknowledging the payment of instalments of conventional interest "as per agreement," found among the papers of the debtor after his death, are not written evidence of an agreement to pay conventional interest on such balance, nor a recognition in writing of any existing agreement to pay it. *Ib.*

X. *Proof of Sale of Immovables.*

15. The authority of an auctioneer to sell immovables or slaves, and the conditions of the sale must be in writing. C. C. 2584. Parol evidence is inadmissible to prove the assent of the owner to conditions of sale proclaimed, at the time, by the auctioneer. C. C. 2415.
Macarty v. Canal and Banking Company, 102.
16. An auction sale of immovables or slaves, not authorized or ratified by the owner in writing, is invalid, unless admitted by the party against whom it is sought to be enforced. C. C. 2155, 2256. *Ib.*
17. The written authority of the vendor is the best evidence of the terms and conditions of the sale of an immovable or slave at auction. The *procès verbal* of the auctioneer is the next best. *Ib.*
18. In the absence of any allegation of fraud or error, parol evidence is inadmissible to prove conditions or stipulations beyond those contained in an authentic act of sale. C. C. 2256. *Ib.*

XI. *Proof of Transfer of Claims or Judgments.*

19. A claim on which suit has been instituted, or a judgment, may be transferred verbally. Such transfers may be proved by witnesses; and where

the amount of the claim, or judgment, exceeds five hundred dollars, the transfer may be established by one witness and corroborating circumstances.

Succession of Delassize, 259.

20. The notice to be given to the debtor to render the transfer of a claim or judgment binding upon third persons, is not required to be in any particular form. It is enough that it be such as to inform him of the fact that his former creditor is divested of all his rights to the thing assigned. Such notice may be proved like any other fact, according to the established rules of evidence; and one witness is sufficient, whatever be the value of the claim or judgment transferred. *Ib.*

XII. Evidence of Parties.

21. The books of a merchant cannot be given in evidence in his favor; but if introduced by the other party, the whole must be taken together. C. C. 2244. *Martinstein v. Creditors*, 6.
22. Where a party is bound to furnish an account, his adversary may use that part of it which is against him, without being compelled to admit the items in it which are in his favor. *Marr v. Hyde*, 13.

See 25, *infra*. CONTEMPT OF COURT, 2.

XIII. Evidence in Particular Actions.

1. In Actions on Bills of Exchange and Promissory Notes.

23. The holder of a note cannot recover on it, without proving the signatures of previous endorers by whom he alleges that the note was transferred to him. He might have recovered against the makers, on proof of the endorsement of the payee, without proving the signatures of the subsequent endorers, had he not set forth such endorsements, and claimed under them. *Hill v. Buddington*, 119.
24. Where a lost bill was accepted verbally, with a knowledge of the fact of its loss, and the acceptors have treated with the plaintiffs as the holders, proof by a witness of the acknowledgment of the payee that he had transferred the bill to the plaintiffs, is sufficient evidence of their title. In such a case slight evidence of title should suffice. *Per Curiam*: The acknowledgment of the payee is not hearsay, but rather the admission of a party to the bill. It would, perhaps, not be good evidence, because secondary, if the bill itself could have been produced.

Northern Bank of Kentucky v. Leverich, 207.

2. In Actions on Policies of Insurance.

25. Decision in *Marchesseau v. Merchants Insurance Company*, (1 Rob. 438), as to the evidence necessary to prove a loss under an open policy of insurance, affirmed. *Wightman v. Western Marine and Fire Insurance Company*, 442.
26. To defeat a recovery on a policy of insurance on the ground that the plaintiff set fire to the premises, it is not necessary that the evidence should be such as would convict the plaintiff on a prosecution for arson. *Ib.*

3. *In Proceedings for a Contempt.*

27. A court may propound interrogatories to an attorney against whom an attachment has been issued for a contempt, for the purpose of ascertaining whether he was the author of the petition containing the contemptuous language for which the attachment was issued, and his intention and motive in writing it; and the court may require an answer to them. Nor is this right a violation of the provision of the 18th sect. of the 6th article of the constitution, which declares, that "in criminal prosecutions no one shall be compelled to give evidence against himself." *State v. Souls*, 500.
4. *In Proceedings under stat. of 10 March, 1834, for Homologation of Sales.*
28. Where the debtor, or other person interested, opposes the homologation of a sale, under execution under the stat. of 10 March, 1834, the burden of proving a compliance with the formalities required by law, is on the party who applies for its homologation. The return of the sheriff on the execution does not throw on the opponent the burden of showing that the formalities of the law have not been complied with. *Lamorandier v. Meyer*, 152.

EXCEPTION.

See PLEADING, 6, 8, 11.

EXECUTION OF JUDGMENT.

- I. *Seizure under Fi. Fa.*
- II. *Opposition of Third Persons, and Injunction.*
- III. *Sale of Things Seized and Distribution of Proceeds.*

I. *Seizure under Fi. Fa.*

1. The right given to a debtor to have a seizure reduced to an amount sufficient to satisfy the judgment and costs, is reserved to him alone. If he do not complain that too much has been seized, no other party can make the objection. *Brown v. Cougot*, 14.
2. A legacy, being indivisible as between the debtor and creditor, without the consent of both, a portion of it only cannot be seized and sold under execution. *Per Curiam*: The executors of the estate cannot, without their consent, be compelled to pay the legacy to a number of transferees, whether by voluntary assignment, or by legal transfers resulting from sales under execution. *Ib.*
3. Notice to the debtor of the seizure of his property under a *fi. fa.* is indispensable, whether the debtor resides within the parish in which the property is situated, or not. C. P. 654, 655, 667. *Lamorandier v. Meyer*, 152.
4. The statement in the return of a sheriff on a *fi. fa.* under which property has been sold, that notice of the seizure was sent by mail to the sheriff of the parish in which the owner of the property resided to be served, is not alone sufficient evidence of the service of notice. *Ib.*
5. A creditor who has obtained judgment against a corporation and issued ex-

execution thereon, may propound interrogatories to any stockholder, under the 13th section of the stat. of 20 March, 1839, to ascertain whether the whole amount of his stock-subscription has been paid in; and if any portion be unpaid, it may be seized by the creditor in satisfaction, as far as it will go, of his judgment. The fact of other stockholders having paid less than their proportion, is a matter to be settled between the stockholders themselves.

Brode v. Firemen's Insurance Company, 244.

6. Where no sale could be made of a slave seized under execution, for want of any bid of sufficient amount to satisfy a special mortgage entitled to priority over the plaintiff's judgment, and the *fi. fa.* is returned into court, the slave cannot be detained by the sheriff. C. P. 684. Nor will the fact of a judgment having been obtained from a court of original jurisdiction, annulling the mortgage as simulated and fraudulent, authorize the detention of the slave, where the defendant has taken a suspensive appeal. If the plaintiff was apprehensive that the slave, if returned to the debtor, might be concealed or taken out of the State, he might have caused him to be sequestered, notwithstanding the suspensive appeal. *Fink v Martin*, 256.

II. Opposition of Third Persons, and Injunction.

7. A promise by a legatee to pay to a third person, on the settlement of a succession, a certain per centage on the amount of a legacy, does not authorize the latter to oppose the seizure and sale of the legacy under a *fi. fa.* taken out by a creditor of the former, on the ground that the seizure is more than sufficient to satisfy the claim, and that the sale of the legacy may cause irreparable injury to the opponent. The right of third persons to oppose an execution, is confined to those cases in which the opponent is the owner of the thing seized, or has a privilege on it. C. P. 395, 396.

Brown v. Cougot, 14.

8. One who suffers a judgment to be rendered against him, without pleading in compensation a debt which he might have opposed to his adversary's demand, does not thereby lose his right of action against the plaintiff for the amount of the debt; but he must institute a separate action therefor, before the court having jurisdiction over the plaintiff's domicile. He cannot enjoin the execution of plaintiff's judgment on the ground of its being extinguished by compensation. C. P. 373. *De Lizardi v. Hardaway*, 22.
9. An execution cannot be enjoined, on grounds which might have been pleaded in defence before judgment. *Ib.*
10. Where notes held by different persons are secured by the same mortgage, no one of them can arrest a sale of the mortgaged property provoked by a holder of another note. He has no other right to interfere, than to cause the proceeds of the sale to be brought into court for distribution.

City Bank v McIntyre, 467.

11. Where a debtor against whom an execution has been issued, makes no opposition to the manner in which the property is sold, when he might have interfered to prevent it, he cannot enjoin the plaintiff in execution, who purchases the property, from enjoying it pending an action to annul the sale. *Ib.*

III. Sale of Things Seized and Distribution of Proceeds.

12. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages existing on it created by the deceased. The purchaser takes the property free of the encumbrances; and the Probate Court may order their erasure. But a District Court cannot in such a case, issue a *mandamus* to the recorder of mortgages directing him to erase the mortgages, where the mortgagees are not made parties to the proceeding. Such a proceeding would be unavailing, unless carried on contradictorily with the parties interested, and against whom it is intended to be used. *Leverich v. Prieur*, 97.
13. Where the debtor, or other person interested, opposes the homologation of a sale, under execution under the stat. of 10 March, 1834, the burden of proving a compliance with the formalities required by law, is on the party who applies for its homologation. The return of the sheriff on the execution does not throw on the opponent the burden of showing that the formalities of law have not been complied with. *Lamorandier v. Meyer*, 152.
14. Where the proceeds of property sold under a special mortgage are more than enough to satisfy the mortgage under which the sale was made, and there are subsequent general mortgages existing against it, the surplus of the price should be applied by the sheriff to the satisfaction, *pro tanto*, of the subsequent general mortgages according to their dates, unless ascertained to have been previously satisfied, before giving the release which the purchaser has a right to demand. In such a case, the sheriff has a right to require the payment of the whole price; nor would the levying of an execution upon such surplus by any other creditor of the mortgagor, secure any privilege to the seizing creditor. *La Gourgue v. Summers*, 175.
15. The receipt of a twelve-months' bond by a seizing creditor does not operate a satisfaction of the judgment. If the bond be unpaid, the creditor has his recourse against the debtor. *Ib.*
16. A judicial mortgagee, in whose favor a twelve-months' bond has been taken for the price of property sold under an execution against his debtor, must show that the bond or property seized proved insufficient to satisfy his claim, to entitle himself to a preference over subsequent judicial mortgagees, in the distribution of the proceeds of other property subject to the general mortgages existing against the debtor. C. P. 715. *Ib.*
17. A *fi. fa.* having been issued on a judgment ordering mortgaged property, consisting of a plantation and slaves, to be sold to satisfy the claim of the mortgagee, the property was adjudicated to a third person, for a certain sum in cash sufficient to satisfy the execution. The *fi. fa.* was returned, and the return showed, that the purchaser had not complied with the conditions of the sale; but he was put in possession of the property, with the assent of the mortgagee, immediately after the adjudication, and was in possession when an execution in favor of a creditor of his own was levied on the property. The purchaser having paid but part of the price due, the plaintiff in the first execution sued out a second *fi. fa.* for the balance, which was also

levied on the property. *Held*, that the adjudication, of itself, transferred to the purchaser all the rights of the party in whose hands the property was seized, (C. P. 690. ;) that the sale was complete, and that the purchaser became thereby the owner, though indebted to the plaintiff in execution for the price, (C. C. 2586 ;) that the debt due by the mortgagor must be considered as satisfied by the first sale ; and that the proceeds of a crop gathered on the plantation, after the seizure at the suit of the creditor of the purchaser, must be applied, *pro tanto*, to the satisfaction of his execution. C. P. 722. C. C. 457. *Commissioners of Bank of Orleans v. Hodge*, 450.

EXECUTOR.

See SUCCESSIONS.

EXECUTORY PROCESS.

See MORTGAGE, IV.

FELONY.

See CRIMINAL LAW, 5, 34.

FIERI FACIAS.

See EXECUTION OF JUDGMENT.

FORGERY.

See CRIMINAL LAW, 20, 21, 80.

FRAUD.

See CONTRACTS, 13.

GRAND JURY.

See CRIMINAL LAW, 15, 29, 37, 38.

HUSBAND AND WIFE.

1. Where the law incapacitates persons from making certain contracts, the form of the contract cannot prevent their being allowed to prove the real nature of the transaction by parol evidence, or other proof going to contradict the contents of the acts, and tending to show that the parties intended to evade the provisions of the law ; as where a wife binds herself as prin-

cipal, though the object was to bind her as surety, for the repayment of money received and used by her husband for his exclusive benefit.

Waggaman v. Zacharie, 181.

2. The wife has a legal mortgage on the property of her husband, or of the community, to secure the reimbursement of her paraphernal funds, received by her husband. *Ib.*
3. Under the Code of 1808, the wife had a tacit mortgage on her husband's property, to indemnify her for any debts for which she might have bound herself jointly with him, from the day of the execution of the obligation. Book 3, tit. 5, art. 53, § 3; tit. 19, art. 17, § 3. The Code of 1825, art. 2412, having prohibited a wife from binding herself for her husband, or jointly with him, for debts contracted by him before or during the marriage, and having declared, (art. 3280,) that no legal mortgage shall exist except in the cases determined by it, the articles of the Code of 1808, relative to the tacit mortgage of the wife for her indemnification for debts contracted jointly with the husband, have ceased to be in force. Stats. 12 March, 1828; 25 March, 1828, s. 25. The fact of the marriage having been contracted before the promulgation of the Code of 1825, cannot entitle the wife to a mortgage to indemnify her for any liability for her husband, contracted since its promulgation. *Ib.*
4. Buildings or other improvements erected by the community on the separate property of one of the spouses, belong to the latter on the dissolution of the community, who will owe to the other spouse one-half of the increased value which such improvements have added to the property. The difference between the value of the property at the time of the dissolution of the community, in the situation in which it was at the date of the marriage, and its real value, with all the improvements, at the time of such dissolution, is the measure of such increased value. C. C. 2377. *Ib.*
5. After a wife has obtained a separation of property, or a separation from bed and board carrying with it a separation of property, she may alienate any property formerly dotal, and, consequently may ratify any alienation made before the separation. Code of 1808, book 3, tit. 5, arts. 36, 41, 42, 97; tit 20, art. 59. C. C. 2337, 2342, 2343, 2355, 2410, 2411, 2421, 2490.
Guérin v. Rivarde, 457.
6. Where dotal property has been alienated by a wife who afterwards obtains a separation of property, prescription will run in favor of the purchaser from the date of the separation. *Ib.*

INDICTMENT.

See CRIMINAL LAW, X.

INJUNCTION.

1. The stat. of 25 March, 1831, s. 3, extended by stat. of 29 March, 1833, s.

3, to third persons obtaining injunctions to arrest the execution of a judgment between other parties, not stating from what date, nor to what time, the interest allowed on the dissolution of an injunction is to run, such interest will be allowed from the date of the injunction to that of its dissolution, as from that time the judgment creditor can proceed with his execution.

Brown v. Cougot, 14.

2. Sec. 3 of the stat. of 25 March, 1831, must be understood as allowing to the defendant in injunction, in case of its dissolution, the highest rate of conventional interest on the amount of his judgment from the date of the injunction to the time of its dissolution, and as leaving it to the discretion of the court to fix the measure of the damages he may be entitled to receive, subject to the restriction that they shall not exceed twenty per cent, unless it be proved that damage was sustained to a larger amount. The court is not bound to allow in all cases damages to the extent of twenty per cent; the amount allowed must depend upon the circumstances of the case. It is only where the principal sum for which the judgment enjoined was rendered bears no interest, that interest can be allowed at ten per cent on dissolving the injunction; where interest was allowed by the judgment enjoined at five per cent on a part of the principal sum, but no interest on the residue, the court should, on dissolving the injunction, allow interest at ten per cent on the latter, and at five per cent on the portion bearing interest at five per cent. Interest is to be allowed only on the principal sum for which judgment was rendered—not on the aggregate of principal, interest and costs.

De Lizardi v. Hardaway, 20.

3. One who suffers a judgment to be rendered against him, without pleading in compensation a debt which he might have opposed to his adversary's demand, does not thereby lose his right of action against the plaintiff for the amount of the debt; but he must institute a separate action therefor, before the court having jurisdiction over the plaintiff's domicile. He cannot enjoin the execution of plaintiff's judgment on the ground of its being extinguished by compensation. C. P. 373. *De Lizardi v. Hardaway*, 22.
4. An execution cannot be enjoined, on grounds which might have been pleaded in defence before judgment. *Ib.*

INSOLVENCY.

1. Decision in *West v. His Creditors*, 5 Rob. 261, affirmed.
West v. Creditors, 123.
2. A claim belonging to a debtor at the time of his making a surrender of his property under a State insolvent law, belongs to the creditors to whom his property was surrendered, though not placed on his *bilan*, nor given up by him at the time; nor can the insolvent, by subsequently placing the claim on the schedule presented by him on an application for the benefit of the bankrupt law of 19 August, 1841, transfer the claim to an assignee appointed by the bankrupt court. The debtor had no longer any title to the claim,

which had been transferred by the cession to the creditors existing at the time of the surrender. *Ib.*

3. The bankrupt law of 1841 did not suspend the operation of the State insolvent laws, in cases in which proceedings had been commenced before its passage. *Ib.*
4. The syndic of the creditors of an insolvent having caused a rule to show cause why a certificate of debt in the hands of the clerk of the court should not be delivered to him to be administered for the benefit of the creditors, to be served on a creditor who had caused the certificate to be seized under execution, the latter objected that the proceeding by rule was illegal. *Held*, that the rule was well taken, the creditor claiming only a privilege or lien on the certificate. Had the latter set up any title to the certificate, and been in possession of it, the proper remedy to recover it would have been by a regular action. *Ib.*
5. Where property attached is released on the execution of bond with surety, and the debtor makes a surrender of his property before judgment, after which the action is cumulated with the insolvent proceedings, and a judgment for the claim is entered up with the consent of the syndic, the surety will be discharged. *Per Curiam*: Had no bond been given, the property attached would not have been subject to satisfy the judgment rendered against the syndic, but would have formed a part of the general fund from which all creditors were to be paid. The bond represents the property attached, so far as the attaching creditor is concerned. If, under the judgment against the syndic, the attaching creditor could have had no privilege on the property seized, he can have no right upon the bond, as the property represented by it has gone to the benefit of the mass of the creditors.

Keyes v. Shannon, 172.

6. Where a debtor, who has made a surrender of his property, but has not been discharged from his debts, afterwards acquires other property, the only mode to subject such property to the payment of those debts, is by opening the proceedings on the cession, and obtaining an order from the court in which they were pending to force a new cession. This may be done by any one of the old creditors; but they have no claim against him, unless he has property more than enough to discharge all debts incurred by him since his surrender, and to support himself and family; and any portion which may be liable for the old debts, must be abandoned for the benefit of all the former creditors. No one of them can sue and obtain judgment against him, and seize and sell such new property in satisfaction of his claim. Stat. 20 February, 1817, s. 28. C. C. 2173.

Quimper v. Bierra, 204.

7. Art. 2173 of the Civil Code, which authorizes any one of the creditors of an insolvent who has made a surrender of his property but has not been discharged from his debts, to force a new cession, on showing that the debtor has acquired property more than sufficient for his maintenance, is not repealed by the 5th sect. of the stat. of 28 March, 1840, authorizing any two judgment

- creditors whose claims exceed a certain amount to coerce a forced surrender, that section having no application to the case provided by art. 2173. *Ib.*
8. No action can be maintained by the syndic of an insolvent estate to recover from a third person the amount of notes given for the price of property belonging to the estate, on the allegations that the notes were illegally obtained by defendant from a former syndic, with full knowledge that the latter had no authority to dispose of them and that he did so in fraud of the creditors of the insolvent, and that the amount of the notes was received by the defendant, where it is neither alleged nor proved that the former syndic has failed to account for the proceeds of the notes nor that any account has ever been demanded of him. *Nicholson v. Jacobs*, 233.

INSURANCE.

1. Notice of a loss of property, insured against fire, should be given with as little delay as the circumstances of the case will permit, to enable the insurers to take measures to protect their interests, and preserve any property saved from damage or loss; but the preliminary proof, required for the purpose of adjusting the loss, need not be presented so promptly. The clause requiring preliminary proof is always construed liberally. Where notice of the loss was given immediately, a delay of nineteen days from the date of the fire, is not unreasonable.

Wightman v. Western Marine and Fire Insurance Company, 442.

2. Notice of the loss of property, insured against fire, and the preliminary proof required, are in the nature of an amicable demand; and to put a party upon strict proof, the want of them should be specially pleaded. *Ib.*
3. The fact of one of the conditions of a policy of insurance requiring that any claim for a loss shall be sustained, "if required, by the books of accounts and other vouchers" of the assured, creates no implied warranty on the part of the latter to keep books of account, and to be ready to exhibit them when called upon. *Ib.*
4. Decision in *Marchesseau v. Merchants Insurance Company*, (1 Rob. 438,) as to the evidence necessary to prove a loss under an open policy of insurance, affirmed. *Ib.*
5. To defeat a recovery on a policy of insurance on the ground that the plaintiff set fire to the premises, it is not necessary that the evidence should be such as would convict the plaintiff on a prosecution for arson. *Ib.*

INTEREST.

1. To ascertain the amount due on a debt bearing interest on which partial payments have been made, interest should be calculated from the maturity of the debt till the day of a partial payment. If the payment exceed the interest then due, it should be applied first to the payment of the interest, and the residue to the extinguishment of the principal; interest to be calculated on the balance due up to the next partial payment, and so on. Should any

partial payment be less than the amount of interest at the time, it must be imputed, so far as it will go, to the extinguishment of interest. C. C. 2160.

Martinstein v. Creditors, 6.

2. Where there is no stipulation for the payment of interest, it is due from the time of putting the debtor in default for the payment of the principal. C. C. 1932. *Marr v. Hyde*, 13.
3. An agent is responsible for interest on any sum of money employed for his own use, from the time of so employing it. C. C. 2984. *Ib.*
4. The stat. of 25 March, 1831, s. 3, extended by stat. of 29 March, 1833, s. 3, to third persons obtaining injunctions to arrest the execution of a judgment between other parties, not stating from what date, nor to what time, the interest allowed on the dissolution of an injunction is to run, such interest will be allowed from the date of the injunction to that of its dissolution, as from that time the judgment creditor can proceed with his execution.
Brown v. Cougot, 14.
5. Sec. 3 of the stat. of 25 March, 1831, must be understood as allowing to the defendant in injunction, in case of its dissolution, the highest rate of conventional interest on the amount of his judgment from the date of the injunction to the time of its dissolution, and as leaving it to the discretion of the court to fix the measure of the damages he may be entitled to receive, subject to the restriction that they shall not exceed twenty per cent, unless it be proved that damage was sustained to a larger amount. The court is not bound to allow in all cases damages to the extent of twenty per cent; the amount allowed must depend upon the circumstances of the case. It is only where the principal sum for which the judgment enjoined was rendered bears no interest, that interest can be allowed at ten per cent on dissolving the injunction; where interest was allowed by the judgment enjoined at five per cent on a part of the principal sum, but no interest on the residue, the court should, on dissolving the injunction, allow interest at ten per cent on the latter, and at five per cent on the portion bearing interest at five per cent. Interest is to be allowed only on the principal sum for which judgment was rendered—not on the aggregate of principal, interest and costs.
De Lizardi v. Hardaway, 20.
6. On the rescission of the sale of a slave for defects in the title, interest on the price cannot be allowed from judicial demand, where the slave remained in the possession of the purchaser. His services must be regarded as equivalent to the interest of the purchase money. Interest should be allowed only from the date of the return, or tender, of the slave to the vendors, in pursuance of the judgment rescinding the sale. *Moreau v. Chauvin*, 157.
7. Where a bill of exchange has not been protested, interest is due only from judicial demand. *Northern Bank of Kentucky v. Leverich*, 207.
8. Under the Code of 1808, conventional interest could not be recovered, unless the amount had been fixed in writing. Testimonial proof was inadmissible to prove an agreement to pay such interest. Book 3, tit. 10, art. 32.
Succession of Durnford, 488.
9. Where an authentic act acknowledging a balance to be due, is silent as to

the payment of interest, receipts signed by the creditor, acknowledging the payment of instalments of conventional interest "as per agreement," found among the papers of the debtor after his death, are not written evidence of an agreement to pay conventional interest on such balance, nor a recognition in writing of any existing agreement to pay it. *Id.*

INTERPRETATION.

See CRIMINAL LAW, II.

INTERROGATORIES.

See CONTEMPT OF COURT, 2.

INTERVENTION.

See PLEADING, III.

JOINT OBLIGATIONS.

See CONTRACTS, V.

JUDGMENT.

1. A judgment rendered in an action against the master and owners of a steamer, for damages on the ground of injury sustained by plaintiff through the fault of those in command of the steamer, is conclusive as to such fault in a subsequent action between the master and one of the owners, to recover from another his proportion of the damages, all of which had been paid by the former. *Howrin v. Clark*, 27.
2. The stat. of 22 March, 1843, sec. 2, dispensing with notices of judgment in certain cases, does not apply to the case of a judgment against a garnishee by whom interrogatories had been answered, rendered on a rule to show cause, where the rule was not served on the garnishee in consequence of his absence from the State; and where, in such a case, notice of judgment was subsequently served on the garnishee, the time within which an appeal will lie must be calculated from the date of the notice.
Brode v. Firemen's Insurance Company, 38.
3. The proper time for the judge to order public notice to be given to the creditors to oppose, if they think fit, an administrator's account, is when he applies for an order to pay the debts of the estate. C. C. 1168, 1169, 1172. It is only when the administrator has funds in his hands, and has made a tableau of distribution, that the creditors can be lawfully called upon to establish their claims contradictorily with each other. But where, at the instance of the administrator, on his prayer for an order to sell the property of the estate, and on the exhibition of a list of its liabilities, the creditors

have been notified to present their claims and to show cause why the account should not be homologated, a judgment rendered thereon in favor of a creditor, will be binding on the estate, though it will not preclude any opposition which other creditors may make to the claim when a regular tableau of distribution shall be filed. *Succession of Hart*, 121.

4. A judgment of nonsuit in a prosecution in the name of the city, instituted before a magistrate for the recovery of the fine imposed for a disturbance of the public peace, is not conclusive evidence, in an action for false imprisonment, against the parties at whose instance the plaintiff was arrested.

Gerber v. Viosca, 150.

5. Defendant having pleaded his discharge as a bankrupt under the act of 1841, plaintiff impeached it, and defendant excepted to the impeachment for vagueness and insufficiency. On the trial of the exception the court sustained it, and thereupon gave judgment at once in favor of defendant upon the merits. *Held*, that the case not being before the court on its merits, but only on the exception, no judgment could be legally rendered but upon the latter leaving the case to be afterwards tried on the merits, when regularly set down; (C. P. 463, 533, 535. Stat. 10 February, 1841, s. 16;) that the main issue was, whether the certificate was a bar to the action; that plaintiff was entitled to a hearing thereon; and that the case should be remanded for that purpose. *Hazard v. Boykin—Rehearing*, 254.

See CRIMINAL LAW, 15, 76.

JURY.

1. In an action by a bank against the surety in a bond given by one of its officers for the faithful discharge of his duties, it is the exclusive province of the jury to ascertain whether the principal had been guilty of official neglect, and to what extent; but plaintiffs have a right to require the court to charge the jury, as to the nature and extent of the legal obligations of the defendant under his bond. *Union Bank v. Thompson*, 227.
2. A judge has no right to state to the jury his own conclusions drawn from the law and evidence in the case. Such expressions of opinion are calculated to have an undue weight with the jury.
Miller v. Canal and Banking Company, 236.
3. Statements made by a juror of the reasons for his concurrence with the other jurors which are inconsistent with his oath as a juror, furnish no ground for a new trial. *Irish v. Wright*, 428.

See CRIMINAL LAW, XIII. GRAND JURY.

LARCENY.

See CRIMINAL LAW, VII. 19, 62, 68.

LETTING AND HIRING.

1. To enable a lessee to recover from the lessor the cost of repairs to the premises leased made by the former, he must show that the latter refused or neglected to make them, though requested to do so; that they were indispensable, and such as the lessor was bound to make; and that the price paid for them was reasonable. C. C. 2663, 2664. *Shall v. Banks*, 168.
2. A lease made by the riparian proprietor of a *batture* lying between the public road and the river in front of his land, cannot be annulled by a lessee who has not been disturbed in the enjoyment of the property, on the ground that the premises leased are a portion of the bank of the river, the use of which is free and not susceptible of being leased. The space between the public road and the *levée* is private property, to the exclusive use of which the owner is entitled; and he may use the part which extends from the *levée* to the river, subject to the regulations of the municipal authority, provided he does not prevent the use of it by others; and he may confer upon a lessee the same right. C. C. 446. *Dennistoun v. Walton*, 211.
3. The Civil Code, art. 2652, recognizes the validity of the lease of another's property, by declaring that he who leases the property of another warrants the enjoyment of it against the claim of the owner. The principal obligation of the lessor is, to maintain his lessee in the quiet enjoyment of the thing, and, while he is undisturbed, he cannot gainsay the title of his lessor; the object of the contract being the use of the thing. *Ib.*

MANDAMUS.

1. No appeal will lie to the Supreme Court from an order of a District Court, directing a mandamus to a parish judge commanding him to allow an appeal to the District Court from a judgment rendered by him on an opposition made under the stat. of 26 March, 1842, relative to lands divided into town lots. Such an order is not a final judgment in any case pending before the District Court. C. P. 566, 839. *Alter*, had the mandamus been refused. *City of Lafayette v. Parish Judge of Jefferson*, 5.
2. Decision in *Conrad v. Prieur*, 5 Robinson, 49, affirmed.
Benjamin v. Prieur, 193.

See MORTGAGE, 4.

MARSHAL.

A marshal is responsible to the party injured, for any damage sustained by the latter in consequence of an illegal sequestration of his property. The marshal must look for indemnity to the party under whose directions he acted. *Lartigue v. Claiborne*, 115.

MORTGAGE.

- I. *Legal Mortgages.*
- II. *Registry and Erasure.*
- III. *Transfer of Mortgages.*
- IV. *Sale of Mortgaged Property.*
- V. *Mortgages as affected by Bankrupt Law of United States of 19 Aug. 1841.*

I. *Legal Mortgages.*

1. A judicial mortgagee, in whose favor a twelve-months' bond has been taken for the price of property sold under an execution against his debtor, must show that the bond or property seized proved insufficient to satisfy his claim, to entitle himself to a preference over subsequent judicial mortgagees, in the distribution of the proceeds of other property subject to the general mortgages existing against the debtor. C. P. 715.

La Gourgue v. Summers, 175.

2. The wife has a legal mortgage on the property of her husband, or of the community to secure the reimbursement of her paraphernal funds, received by her husband. *Waggaman v. Zacharie*, 181.
3. Under the Code of 1808, the wife had a tacit mortgage on her husband's property, to indemnify her for any debts for which she might have bound herself jointly with him, from the day of the execution of the obligation. Book 3, tit. 5, art. 53, § 3; tit. 19, art. 17, § 3. The Code of 1825, art. 2412, having prohibited a wife from binding herself for her husband, or jointly with him, for debts contracted by him before or during the marriage, and having declared, (art. 3280,) that no legal mortgage shall exist except in the cases determined by it, the articles of the Code of 1808, relative to the tacit mortgage of the wife for her indemnification for debts contracted jointly with the husband, have ceased to be in force. Stats. 12 March, 1828; 25 March, 1828, s. 25. The fact of the marriage having been contracted before the promulgation of the Code of 1825, cannot entitle the wife to a mortgage to indemnify her for any liability for her husband, contracted since its promulgation. *Ib.*

II. *Registry and Erasure.*

4. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages existing on it created by the deceased. The purchaser takes the property free of the encumbrances; and the Probate Court may order their erasure. But a District Court cannot in such a case, issue a *mandamus* to the recorder of mortgages directing him to erase the mortgages, where the mortgagees are not made parties to the proceeding. Such a proceeding would be unavailing, unless carried on contradictorily with the parties interested, and against whom it is intended to be used. *Leverich v. Prieur*, 97.

5. A recorder of mortgages is not bound, *ex officio*, to erase from his records mortgages extinguished by a probate sale, or by the want of a new inscription, on being informed of the circumstances under which they are extinguished. He may do so, but it will be at his peril. The question whether the mortgages have been extinguished, can only be decided contradictorily with the mortgagees. *Ib.*
6. A mortgage duly recorded, can be erased from the books of the recorder only by the consent of the mortgagee, or by a judgment decreeing such erasure. C. C. 3335, 3336. It is the property of the mortgagee, and cannot be destroyed by any act of the recorder.

Macarty v. Landreaux, 130.

7. A mortgagee cannot maintain an action against a recorder of mortgages for damages for the mere act of erroneously erasing a mortgage, where no attempt has been made to enforce the mortgage. As the act of the recorder could not destroy the mortgage, even against an innocent purchaser, who had bought on the faith of a certificate of there being no mortgage on the property, he can be made liable to the mortgagee for such damages only as may result from the fact of the mortgagee's recourse against the mortgaged property being rendered thereby more difficult and expensive. But the recorder will be responsible to the purchaser, for any loss to which he may have been subjected by the error. *Ib.*
8. The certificate of a recorder of mortgages as to the existence or erasure of mortgages, is only *prima facie* evidence of the facts stated in it. *Ib.*
9. The certificate of a recorder of mortgages declaring that no mortgages exist on certain property, is *prima facie* evidence that none exist. The burden of proving the contrary, is on the party who contests the correctness of the certificate. *Sewell v. Hennen*, 216.

III. Transfer of Mortgages.

10. Though the negotiability of a note secured by mortgage is not restricted, so far as the personal responsibility of the parties to it is concerned, by its being *paraphed, ne varietur*, by a notary, for the purpose of identifying it, and though want of consideration cannot be opposed to a transferee, for a valuable consideration, before maturity, who received it in the usual course of business, the mortgage given to secure the note does not partake of its negotiability. It is merely assignable, and is subject to all the equities existing between the original parties. *Per Curiam*: A mortgage cannot be transferred to a third person, so as to give him any greater right than the mortgagee himself possessed. *Schmidt v. Frey*, 435.

IV. Sale of Mortgaged Property.

11. The clause, *de non alienando*, in a sale in which the vendor reserves a mortgage, does not prevent a sale of the property by the mortgagor. The latter may transfer the property, subject to the right which that clause gives the mortgagee of proceeding summarily against it, as if still belonging to the mortgagor. *Ducros v. Fortin*, 165.

12. Where the proceeds of property sold under a special mortgage are more than enough to satisfy the mortgage under which the sale was made, and there are subsequent general mortgages existing against it, the surplus of the price should be applied by the sheriff to the satisfaction, *pro tanto*, of the subsequent general mortgages according to their dates, unless ascertained to have been previously satisfied, before giving the release which the purchaser has a right to demand. In such a case, the sheriff has a right to require the payment of the whole price; nor would the levying of an execution upon such surplus by any other creditor of the mortgagor, secure any privilege to the seizing creditor. *La Gourgue v. Summers*, 175.
13. Where notes held by different persons are secured by the same mortgage, no one of them can arrest a sale of the mortgaged property provoked by a holder of another note. He has no other right to interfere, than to cause the proceeds of the sale to be brought into court for distribution.

City Bank v. McIntyre, 467.

14. A party in whose favor judgment had been rendered in a court of original jurisdiction on an application for an order of seizure and sale, caused the mortgaged property to be sold pending a devolutive appeal, and purchased it himself, crediting the execution by the price. The judgment having been reversed on appeal and the case remanded for a new trial, on a rule taken by defendants on the plaintiff, to show cause why the sale should not be rescinded: *Held*, that the court properly ordered the rule to be made absolute and the sale rescinded, unless the price of the adjudication was paid into court within a fixed period; and that the right to rescind the sale could not be affected by any judicial mortgage in favor of a creditor of the purchaser, the eviction of the latter by a superior title relieving the property from all mortgages acquired under him. *Beaulieu v. Furst*, 485.

V. Mortgages as affected by Bankrupt Law of United States of 19 August, 1841.

15. The District Court of the United States, sitting in bankruptcy under the act of Congress of 19 August, 1841, was authorized to cite persons holding mortgages, under the State laws, on property surrendered by a bankrupt, and to order the erasure of their mortgages, when necessary for the settlement of the bankrupt estate. *Ducros v. Fortin*, 165.
16. Where one holding a mortgage on property surrendered by a bankrupt under the act of 19 August, 1841, though cited before the District Court of the United States in which the proceedings in bankruptcy were pending, to show cause why the property mortgaged should not be sold free of encumbrance, reserving his rights upon the proceeds, suffers the rule taken on him to be made absolute without opposition, he must be considered as having waived any right he may have had to oppose it, and he will be bound thereby. He cannot afterwards be permitted to set up his mortgage against a *bona fide* purchaser, who has bought on the faith of his apparent acquiescence.

Id.

17. Decision in *Conrad v Prieur*, 5 Robinson, 49, affirmed.

Benjamin v Prieur, 193.

MANSLAUGHTER.

See CRIMINAL LAW, 6, 7, 8.

MURDER.

See CRIMINAL LAW, 6, 9, 23, 24, 26, 27, 28, 35, 40, 46, 48, 73, 75.

NEW ORLEANS.

1. The stat. of 8 March, 1836, dividing the city of New Orleans into three municipalities, did not abolish the old city corporation, nor deprive it of the right of suing for the amount of forfeited bonds and recognizances, directed by sec. 4 of the stat. of 1 April, 1835, to be recovered for its use. There is nothing in the statute dividing the city into municipalities, nor in any other statute, giving to any municipality the right to recover the amount of a forfeited bond or recognizance executed before its Recorder.

Second Municipality v. Labatut, 33.

2. Owners of real estate in the second Municipality of New Orleans cannot be compelled to pay any portion of the cost of paving done in front of their property, unless such paving was directed to be done by a special ordinance of the Municipal Council, after notice given to those interested, that they might have an opportunity of opposing its passage. Stats. 8 March, 1836, s. 11; 20 March, 1840, s. 7. Ord. of 2d Municipality of New Orleans of 2 May, 1836. Where paving has been done on the mere order of the chairman of the committee on streets and landings, a subsequent ordinance providing for the payment for the work, though it may be considered a ratification by the council of the acts of the chairman, cannot bind those who had no opportunity of opposing the execution of the work by showing that it was unnecessary. *Second Municipality v. Botts*, 198.

NEW TRIAL.

Statements made by a juror of the reasons for his concurrence with the other jurors, which are inconsistent with his oath as a juror, furnish no ground for a new trial. *Irish v. Wright*, 428.

See CRIMINAL LAW, 53, 58, XV.

NOLLE PROSEQUI.

See CRIMINAL LAW, XII.

NOTICE.

See JUDGMENT, 2.

OFFENCES AND QUASI-OFFENCES.

1. The owners of a steamer are liable for any injury to others, resulting from the fault of those charged with the navigation of the steamer.

Enders v. Steamer Henry Clay, 30.

2. Where, in consequence of the neglect of the agents of a railway company to chain or put blocks under the wheels of cars left standing on a track, constructed on a pier used as a public highway, one, who was crossing the track at a point over which it was necessary for him to pass in order to reach his vessel, moored to the pier, is, during a dark night, and without any fault on his part, run over and seriously injured by the cars, which had been put in motion by a strong wind, he will be entitled to recover damages to the extent of the injury sustained. C. C. 2294, 2295.

Brown v. Pontchartrain Railroad Company, 45.

3. A bishop cannot be made liable in damages for any expression of opinion as to the extent of his episcopal authority, nor for any act or omission in the exercise of his spiritual functions. Arts. 2294, 2295 of the Civil Code do not apply to such cases. Such acts or omissions violate no legal right, nor do they involve any dereliction of legal duty or obligations. Courts of justice enforce civil obligations only—not spiritual ones.

Wardens of Church of St. Louis v. Blanc, 51.

4. Malice is of the essence of slander. Unless it be alleged, no action can be maintained for a libel. *Ib.*
5. A corporation cannot maintain an action for slander. *Ib.*
6. One who causes a drunken person to be arrested by the police for disturbing the peace in the neighborhood of his residence, is not liable in damages for so doing. *Stertzback v. Quirk*, 111.
7. Though sheriffs and other public officers, acting in good faith, within the sphere of their duties, and in obedience to legal process, are entitled to protection, yet when they act in a manner contrary to their own convictions of right, and upon bonds of indemnity, persons injured by their proceedings are entitled to a liberal measure of damages. *Pascal v. Ducros*, 112.
8. In an action against a sheriff for damages, for the illegal seizure and removal of plaintiff's furniture, under an execution against a third person, evidence is admissible, under a general allegation that the furniture was removed against plaintiff's earnest remonstrances, to show, in aggravation of damages, the manner in which the furniture was removed, and all the concomitant circumstances. *Ib.*
9. In assessing damages for an illegal seizure of furniture, made by a sheriff under an execution against a third person, the jury should take into consideration the manner in which the seizure was made, and the degree of rigor or lenity with which the officer acted. *Ib.*
10. The deputy by whom an illegal seizure was made, need not be joined, as a co-trespasser, with the sheriff, in an action against the latter for damages. *Ib.*

11. After an answer to the merits, an exception on the ground of the non-joinder of a co-trespasser, is too late. *Ib.*
12. A marshal is responsible to the party injured, for any damage sustained by the latter in consequence of an illegal sequestration of his property. The marshal must look for indemnity to the party under whose directions he acted. *Lartigue v. Claiborne*, 115.
13. One who designedly represents another as solvent, when he knew that he was not so, and thereby induces a third person to give him a credit, in consequence of which the latter sustains a loss, will be bound to indemnify the party injured by such misrepresentations. *Parrish v. Cirode*, 117.
14. A mortgagee cannot maintain an action against a recorder of mortgages for damages for the mere act of erroneously erasing a mortgage, where no attempt has been made to enforce the mortgage. As the act of the recorder could not destroy the mortgage, even against an innocent purchaser, who had bought on the faith of a certificate of there being no mortgage on the property, he can be made liable to the mortgagee for such damages only as may result from the fact of the mortgagee's recourse against the mortgaged property being rendered thereby more difficult and expensive. But the recorder will be responsible to the purchaser, for any loss to which he may have been subjected by the error. *Macarty v. Landreaux*, 131.
15. Where one employed by the lessee of a market to collect his dues, but not to superintend its police, causes a person to be arrested for making a disturbance in the market, the act not being within the scope of his authority as agent, cannot subject the principal to damages for any injury resulting therefrom. *Gerber v. Viosca*, 150.
16. A judgment of nonsuit in a prosecution in the name of the city, instituted before a magistrate for the recovery of the fine imposed for a disturbance of the public peace, is not conclusive evidence, in an action for false imprisonment, against the parties at whose instance the plaintiff was arrested. *Ib.*
17. Where the master of a steamer, for the fraudulent purpose of aiding a debtor in removing his property into a foreign country beyond the reach of a creditor, conceals from the latter the fact of his having entered into an arrangement with the debtor for its removal, and, with a full knowledge of the rights of the creditor, transports the property out of the United States, thereby preventing the creditor from levying an attachment and saving his debt, he will be liable to the creditor for the amount of the debt, where it does not exceed the value of the property so removed.

Irish v. Wright, 428.

See JURY, 1.

OPPOSITION OF THIRD PERSONS.

A promise by a legatee to pay a third person, on the settlement of a succession, a certain per centage on the amount of a legacy, does not authorize the latter to oppose the seizure and sale of the legacy under a *fi. fa.* taken

out by a creditor of the former, on the ground that the seizure is more than sufficient to satisfy the claim, and that the sale of the legacy may cause irreparable injury to the opponent. The right of third persons to oppose an execution, is confined to those cases in which the opponent is the owner of the thing seized, or has a privilege on it. C. P. 395, 396.

Brown v. Cougot, 14.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE, 2.

PARTIES.

See EVIDENCE, XII. PLEADING, I.

PAYMENT.

1. To ascertain the amount due on a debt bearing interest on which partial payments have been made, interest should be calculated from the maturity of the debt till the day of a partial payment. If the payment exceed the interest then due, it should be applied first to the payment of the interest, and the residue to the extinguishment of the principal; interest to be calculated on the balance due up to the next partial payment, and so on. Should any partial payment be less than the amount of interest at the time, it must be imputed, so far as it will go, to the extinguishment of interest. C. C. 2160.

Martinstein v. Creditors, 6.

2. Payment by the drawees of the original of a bill, drawn in duplicate payable to order, made under a forged endorsement, is no defence to an action by the payee, against the drawer, on the protest of the duplicate for non-acceptance. The payment made on the forged endorsement was at the risk of those who made it. *Brown v. Mechanics and Traders Bank*, 143.
3. The receipt of a twelve-months' bond by a seizing creditor does not operate a satisfaction of the judgment. If the bond be unpaid, the creditor has his resource against the debtor. *La Gourgue v. Summers*, 175.

PERJURY.

See CRIMINAL LAW, 30, 39.

PLEADING.

I. *Parties to Action.*

II. *Exceptions and Answer.*

III. *Intervention.*

(In Criminal Prosecutions, See CRIMINAL LAW, XI.)

I. *Parties to Action.*

1. The deputy by whom an illegal seizure was made, need not be joined, as a co-trespasser, with the sheriff, in an action against the latter for damages.

Pascal v. Ducros, 113.

2. After an answer to the merits, an exception on the ground of the non-joinder of a co-trespasser, is too late. *Ib.*

3. No law authorizes the substitution of the name of the transferee of a claim in suit for that of the transferor, on the records of the court. In case of such a transfer, it is customary to prosecute the suit to judgment in the name of the plaintiff, but for the benefit of the transferee.

Succession of Delassize, 259.

4. Heirs represented by an attorney of absent heirs appointed by a court, are not heirs "*represented in the State*," within the meaning of art. 122 of the Code of Practice, which declares, that "all actions may be brought against vacant successions, when all the heirs are absent and not represented in the State, provided they be instituted against the curator." The representation which it contemplates is that of an agent, or curator duly appointed; and when the absent heirs are not so represented, a judgment rendered against the curator of the vacant succession, is as valid against the succession as if rendered against the heirs. C. P. 123. C. C. 1205.

Succession of Durnford, 488.

II. *Exceptions and Answer.*

5. A judgment rendered against the master and other owners of a steamer for damages, for injuries sustained in consequence of the fault of the master, having been paid by the latter and one of the owners, they sued the other owner to recover his proportion of the damages. Defendant denied his liability to pay anything to the master, who had the exclusive control of the boat at the time of the injury; and prayed that, for any amount which he might be condemned to pay to the other plaintiff, he might have judgment in warranty against the master: *Held*, that defendant is not bound to reimburse to the master any portion of the damages occasioned by his own fault (C. C. 2972); and that, though defendant, if he pay any portion of the loss, may have recourse against the master, the latter cannot be cited in warranty, his liability not being a case of personal warranty within the meaning of art. 379 of the Code of Practice. *Per Curiam*: Until defendant pays a portion of the loss he has nothing to claim of his agent, and can have no judgment against him. *Howrin v. Clark*, 27.
6. Where in an action commenced by attachment against a steamer, its captain and owners, the names of the owners are not set forth in the petition, but defendants answer to the merits without pleading any exception, and, on judgment being rendered against them personally, execute an appeal bond disclosing their names, no objection can be made to the irregularity of a judgment, *in personam*, against them, on the ground of the omission to set out the names of the owners. *Enders v. Steamer Henry Clay*, 30.

7. Where the defendant in an action to rescind the sale of a slave on account of a redhibitory defect, alleges, in her answer, that the defect complained of was an apparent one, the allegation will preclude her from recovering against her vendor cited in warranty. *Lemos v. Daubert—Rehearing*, 225.
8. After property attached has been bonded, and the case is at issue on the merits, it is too late to object to the attachment as irregular, in consequence of the suit being for damages. *Irish v. Wright*, 428.
9. Notice of the loss of property insured against fire, and the preliminary proof required, are in the nature of an amicable demand; and to put a party upon strict proof, the want of them should be specially pleaded.
Wightman v. Western Marine and Fire Insurance Company, 442.
10. Pleading in compensation should be favored, as it tends to prevent the unnecessary multiplication of suits. *Succession of Durnford*, 486.
11. Appellant, while acting as curator of a vacant succession, was evicted from land purchased by him from the deceased, and in his account he credited himself with the amount claimed as damages for the eviction. On an opposition by the heirs, on the ground of prescription: *Held*, that until they appeared and claimed the succession the curator was its legal representative, and could not enforce a demand, in his own favor, against it; and that to the extent of the funds in his hands, his claim was compensated, and might be opposed to the claims of the heirs by way of exception, even if incapable of being enforced in a direct action. *Ib.*

III. Intervention.

12. An intervenor, who claims property in controversy between other parties, cannot interfere further than to prove his right to the property. He cannot contest the plaintiff's claim against the defendant, nor urge any irregularities in the suit; nor plead exceptions having for their object the dismissing of the action. *West v. Creditors*, 123.
13. A garnishee cannot interfere, as to the merits of the case, between the plaintiff and defendant. *Brode v. Firemen's Insurance Company*, 244.

PLEDGE.

1. Art. 3134 of the Civil Code determines the rights of a pledgee in relation to the other creditors of the pledgor. The right of the pledgor against the pledgee are regulated by art. 3132. *Florence v. Greene*, 10.
2. Under art. 3132 of the Civil Code, the pledgor is entitled to choose whether the thing pledged shall be retained by the pledgee at its appraised value, or be sold at public auction, only when the pledgee does not insist upon its being sold to obtain payment out of the price, but signifies his wish, with the consent of the pledgor, to have it adjudicated to himself at its appraised value. *Ib.*

PRESCRIPTION.

1. The possession by the creditor of property of the debtor, with the consent

of the latter, for the purpose of paying himself out of its hire, is an acknowledgment of the debt, interrupting prescription.

Montgomery v. Levistones, 145.

2. Where a debtor acknowledges a debt and asks for indulgence, it is a tacit renunciation of any prescription which may have been acquired. C. C. 3424. *Ib.*
3. Where dotal property has been alienated by a wife, who afterwards obtains a separation of property, prescription will run in favor of the purchaser from the date of the separation. *Ib.*

PRESUMPTION.

See EVIDENCE, II.

PRIVILEGE.

1. Decision in *Conrad v. Prieur*, 5 Robinson, 49, affirmed.
Benjamin v. Prieur, 193.
2. To entitle the United States under the act of Congress of 3 March, 1797, s. 5, to have any debt due to them first satisfied out of the property of an insolvent, where the latter has made a voluntary assignment for the benefit of his creditors, there must be an actual insolvency though not a declared one, and the assignment must have been a general one; but a party cannot by assigning all his property by different acts, defeat the priority of the United States, under the pretext of the assignments being partial.

United States v. Bank of United States, 262.

PUBLIC THINGS.

1. Where the owner of ground, in dividing it into lots for sale, reserves a part for a public alley, and subsequently sells the lots with reference to a plan on which the alley is described, and as fronting on the alley, the ground set apart for the alley must be considered as dedicated to public use; and the purchasers of the lots have a right to insist upon its being kept open for the purposes for which it was thus dedicated. *M'Donogh v. Calloway*, 92.
2. A lease made by the riparian proprietor of a *batture* lying between the public road and the river in front of his land, cannot be annulled by a lessee who has not been disturbed in the enjoyment of the property, on the ground that the premises leased are a portion of the bank of the river, the use of which is free and not susceptible of being leased. The space between the public road and the *levée* is private property, to the exclusive use of which the owner is entitled; and he may use the part which extends from the *levée* to the river, subject to the regulations of the municipal authority, provided he does not prevent the use of it by others; and he may confer upon a lessee the same right. C. C. 446. *Dennistoun v. Walton*, 211.

QUASI-OFFENCES.

See OFFENCES AND QUASI-OFFENCES.

RAPE.

See CRIMINAL LAW, V.

REDHIBITORY ACTION.

See SALE, 11, 12, 16, 17.

REGISTRY.

See MORTGAGE, II.

RELIGIOUS FREEDOM.

In framing the State Constitution of 1812, it was deemed unnecessary to insert any restriction upon the power of the legislature on the subject of religious sentiments or worship, as it had already been settled, by solemn compact between the original states and the people of the territory, unalterable but by common consent, under the act of congress of 2d March, 1805, and in conformity with the ordinance of that body of 13th July, 1767, that religious freedom, in its broadest sense, should form the basis of all laws, constitutions and governments which forever after might be formed within said territory. *Wardens of Church of St. Louis v. Blanc*, 51.

RESCISSION.

See SALE, III.

RULE TO SHOW CAUSE.

The syndic of the creditors of an insolvent having caused a rule to show cause why a certificate of debt in the hands of the clerk of the court should not be delivered to him to be administered for the benefit of the creditors, to be served on a creditor who had caused the certificate to be seized under execution, the latter objected that the proceeding by rule was illegal. *Held*, that the rule was well taken, the creditor claiming only a privilege or lien on the certificate. Had the latter set up any title to the certificate, and been in possession of it, the proper remedy to recover it would have been by a regular action. *West v. Creditors*, 123.

SALE.

- I. *Requisites and Proof of Sale.*
- II. *Obligations and Privilege of Vendor.*
- III. *Rescission.*
- IV. *Judicial Sales.*

I. *Requisites and Proof of Sale.*

1. The authority of an auctioneer to sell immovables or slaves, and the conditions of the sale must be in writing. C. C. 2584. Parol evidence is inadmissible to prove the assent of the owner to conditions of sale proclaimed, at the time, by the auctioneer. C. C. 2415.

Macarty v. Canal and Banking Company, 102.

2. An auction sale of immovables or slaves, not authorized or ratified by the owner in writing, is invalid, unless admitted by the party against whom it is sought to be enforced. C. C. 2255, 2256. *Ib.*
3. The written authority of the vendor is the best evidence of the terms and conditions of the sale of an immovable or slave at auction. The *procès verbal* of the auctioneer is the next best. *Ib.*
4. In the absence of any allegation of fraud or error, parol evidence is inadmissible to prove conditions or stipulations beyond those contained in an authentic act of sale. C. C. 2256. *Ib.*
5. There must be an express stipulation in a contract of sale, to render joint purchasers liable, *in solido*, or as sureties for each other, for the price. Such liability cannot be presumed. *Kohn v. Hall*, 149.

II. *Obligations and Privilege of Vendor.*

6. Where the owner of ground, in dividing it into lots for sale, reserves a part for a public alley, and subsequently sells the lots with reference to a plan on which the alley is described, and as fronting on the alley, the ground set apart for the alley must be considered as dedicated to public use; and the purchasers of the lots have a right to insist upon its being kept open for the purposes for which it was thus dedicated.

M'Donogh v. Calloway, 92.

7. The clause, *de non alienando*, in a sale in which the vendor reserves a mortgage, does not prevent a sale of the property by the mortgagor. The latter may transfer the property, subject to the right which that clause gives the mortgagee of proceeding summarily against it, as if still belonging to the mortgagor. *Ducros v. Fortin*, 165.
8. Where one to whom a slave has been adjudicated at public auction, discovers that the slave is affected with a redhibitory disease, he may decline to complete the purchase. *Lemos v. Daubert*, 224.
9. The obligation of a vendor, under his warranty, must be determined by the law in force at the time of the sale. *Succession of Durnford*, 488.
10. Where a judgment has been rendered in the Supreme Court in favor of

the plaintiff, in an action against the purchaser of land instituted by a third person claiming to be its owner, the purchaser must be considered as evicted from the date of the order from the execution of the judgment made in the court below, and the value of the property at that time is the measure of the damages due for the eviction—not its value at any subsequent period when the owner may take actual possession. Code of 1808, book 3, tit. 6, art. 57. *Ib.*

III. Rescission.

11. The purchaser of a slave, who institutes a redhibitory action on the ground that the slave is a runaway, is not bound to prove that the vice existed before the sale, when discovered within two months thereafter; but this presumption ceases where it is proved that unusual punishments have been inflicted on the slave. Stat. 2 January, 1834, s. 3. *Rist v. Hagan*, 106.
12. One who has given notice in writing of his intention to become a resident of the State to the parish judge of the parish in which he proposes to reside, but who has not resided within it one year without interruption, not having acquired a residence in the manner authorized by the stats. of 7 March, 1816, s. 2, and 16 March, 1818, s. 1, must be considered as "*not domiciliated in the State*" within the meaning of art. 2512 of the Civil Code; and, in case of his absence from the State within a year from the date of a sale made by him, the prescription of one year against redhibitory actions will be suspended as to him during his absence. *Ib.*
13. Where a vendor fails to comply with a stipulation made by him to cause a general mortgage existing on the property sold to be erased, the purchaser may require the rescission of the sale. C. C. 1920, 2041. To determine whether a failure of a party to execute an engagement will authorize the rescission of the contract, it is only necessary to consider whether the stipulation be such that the contract would not have been entered into without it. *Moreau v. Chauvin*, 157.
14. Plaintiff purchased a slave from defendants, who stipulated in the act of sale to erase, within a certain time, a general mortgage existing on the property in favor of the minor children of their vendor, which the latter had bound herself to cancel. The mortgage not having been erased, plaintiff sued to rescind the sale. On a plea by defendants that they had not been put *in mora*, in the manner prescribed by arts. 1905, 1906, 1907 of the Civil Code, it was shown that they had been repeatedly requested to comply with their contract, and that, eighteen months after the period at which the mortgage was to have been erased, their vendor, though often requested to do so, had not instituted any proceeding for the purpose of giving a special mortgage, in place of the general one she had agreed to erase: *Held*, that in such a case it was unnecessary to put the defendants in default in the manner required by arts. 1905, *et seq.* of the Civil Code; and that the thing to be performed depending on the will of another, over whom they have no control, the contract is dissolved of right, in consequence of their inability to comply with it. C. C. 2041, 2042. *Ib.*

15. On the rescission of the sale of a slave for defects in the title, interest on the price cannot be allowed from judicial demand, where the slave remained in the possession of the purchaser. His services must be regarded as equivalent to the interest of the purchase money. Interest should be allowed only from the date of the return, or tender of the slave to the vendors, in pursuance of the judgment rescinding the sale. *Ib.*
16. Where the defendant in an action to rescind the sale of a slave on account of a redhibitory defect, alleges, in her answer, that the defect complained of was an apparent one, the allegation will preclude her from recovering against her vendor cited in warranty. *Lemos v. Daubert—Rehearing*, 225.
17. A sale cannot be rescinded for a redhibitory defect, proved by the defendant, or admitted by the plaintiff, to have been an apparent one, or one known to the purchaser at the time of the purchase. C. C. 2497, 2498. *Ib.*
18. A party in whose favor judgment had been rendered in a court of original jurisdiction on an application for an order of seizure and sale, caused the mortgaged property to be sold pending a devolutive appeal, and purchased it himself, crediting the execution by the price. The judgment having been reversed on appeal and the case remanded for a new trial, on a rule taken by defendants on the plaintiff, to show cause why the sale should not be rescinded: *Held*, that the court properly ordered the rule to be made absolute and the sale rescinded, unless the price of the adjudication was paid into court within a fixed period; and that the right to rescind the sale could not be affected by any judicial mortgage in favor of a creditor of the purchaser, the eviction of the latter by a superior title relieving the property from all mortgages acquired under him. *Beauheu v. Furst*, 485.

IV. Judicial Sales.

19. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages existing on it created by the deceased. The purchaser takes the property free of the encumbrances; and the Probate Court may order their erasure. But a District Court cannot in such a case, issue a *mandamus* to the recorder of mortgages directing him to erase the mortgages, where the mortgagees are not made parties to the proceeding. Such a proceeding would be unavailing, unless carried on contradictorily with the parties interested, and against whom it is intended to be used.
Leverich v. Prieur, 97.
20. The statement in the return of a sheriff on a *fi. fa.* under which property has been sold, that notice of the seizure was sent by mail to the sheriff of the parish in which the owner of the property resided to be served, is not alone sufficient evidence of the service of notice.
Lamorandier v. Meyer, 152.
21. Where the debtor, or other person interested, opposes the homologation of a sale, under execution under the stat. of 10 March, 1834, the burden of proving a compliance with the formalities required by law, is on the party

who applies for its homologation. The return of the sheriff on the execution does not throw on the opponent the burden of showing that the formalities of law have not been complied with. *Id.*

22. Where one holding a mortgage on property surrendered by a bankrupt under the act of 19 August, 1841, though cited before the District Court of the United States in which the proceedings in bankruptcy were pending, to show cause why the property mortgaged should not be sold free of encumbrance, reserving his rights upon the proceeds, suffers the rule taken on him to be made absolute without opposition, he must be considered as having waived any right he may have had to oppose it, and he will be bound thereby. He cannot afterwards be permitted to set up his mortgage against a *bona fide* purchaser, who has bought on the faith of his apparent acquiescence. *Ducros v. Fortin*, 165.
23. A *fi. fa.* having been issued on a judgment ordering mortgaged property, consisting of a plantation and slaves, to be sold to satisfy the claim of the mortgagee, the property was adjudicated to a third person, for a certain sum in cash sufficient to satisfy the execution. The *fi. fa.* was returned, and the return showed, that the purchaser had not complied with the conditions of the sale; but he was put in possession of the property, with the assent of the mortgagee, immediately after the adjudication, and was in possession when an execution in favor of a creditor of his own was levied on the property. The purchaser having paid but part of the price due, the plaintiff in the first execution sued out a second *fi. fa.* for the balance, which was also levied on the property. *Held*, that the adjudication, of itself, transferred to the purchaser all the rights of the party in whose hands the property was seized, (C. P. 690;) that the sale was complete, and that the purchaser became thereby the owner, though indebted to the plaintiff in execution for the price, (C. C. 2586;) that the debt due by the mortgagor must be considered as satisfied by the first sale; and that the proceeds of a crop gathered on the plantation, after the seizure at the suit of the creditor of the purchaser, must be applied, *pro tanto*, to the satisfaction of his execution. C. P. 722. C. C. 457. *Commissioners of Bank of Orleans v. Hodge*, 450.
24. Where a debtor against whom an execution has been issued, makes no opposition to the manner in which the property is sold, when he might have interfered to prevent it, he cannot enjoin the plaintiff in execution, who purchases the property, from enjoying it pending an action to annul the sale. *City Bank v. McIntyre*, 467.

SEQUESTRATION.

Where no sale could be made of a slave seized under execution, for want of any bid of sufficient amount to satisfy a special mortgage entitled to priority over the plaintiff's judgment, and the *fi. fa.* is returned into court, the slave cannot be detained by the sheriff. C. P. 684. Nor will the fact of a judgment having been obtained from a court of original jurisdiction, annulling the mortgage as simulated and fraudulent, authorize the detention of the

slave, where the defendant has taken a suspensive appeal. If the plaintiff was apprehensive that the slave, if returned to the debtor, might be concealed or taken out of the state, he might have caused him to be sequestered, notwithstanding the suspensive appeal. *Fink v. Martin*, 256.

SHERIFF.

1. Though sheriffs and other public officers, acting in good faith, within the sphere of their duties, and in obedience to legal process, are entitled to protection, yet when they act in a manner contrary to their own convictions of right, and upon bonds of indemnity, persons injured by their proceedings are entitled to a liberal measure of damages. *Pascal v. Ducros*, 112.
2. In an action against a sheriff for damages, for the illegal seizure and removal of plaintiff's furniture, under an execution against a third person, evidence is admissible, under a general allegation that the furniture was removed against plaintiff's earnest remonstrances, to show, in aggravation of damages, the manner in which the furniture was removed, and all the concomitant circumstances. *Ib.*
3. In assessing damages for an illegal seizure of furniture, made by a sheriff under an execution against a third person, the jury should take into consideration the manner in which the seizure was made, and the degree of rigor or lenity with which the officer acted. *Ib.*
4. The deputy by whom an illegal seizure was made, need not be joined, as a co-trespasser, with the sheriff, in an action against the latter for damages. *Ib.*
5. The return of a sheriff showing the manner in which interrogatories propounded to a witness were served on the opposite party, may be amended on the trial of the case. *Per Curiam*: A sheriff should be permitted to amend his return so as to make it conform to the fact, whenever it is called in question. It is not too late on the trial of the case.

Miller v. Canal and Banking Company, 236.

See CRIMINAL LAW, 55.

STATUTES, CITED, EXPOUNDED, &c.

- I. *Statutes of United States.*
- II. *Statutes of the State.*
- III. *Statute of Mississippi.*
- IV. *Statutes of Pennsylvania.*
- V. *Statutes of England.*

I. *Statutes of United States.*

1787. July 13. Territory North West of river Ohio. *Wardens of Church of St. Louis v. Blanc*, 51.

1797. March 3, s. 5. Priority of Payment of United States. *United States v. Bank of United States*, 262.
 1799. ————2. ———— *Ib.*
 1805. ————2. Territory of Louisiana. *Wardens of Church of St. Louis v. Blanc*, 51.
 1841. August 19. Bankruptcy. *West v. Creditors*, 123. *Ducros v. Fortin*, 165. *Hazard v. Boykin*, 253, 254.

II. Statutes of the State.

1805. May 4, s. 2. Rape. *State v. Bill*, 527.
 ———— s. 33. Adopting English Common Law. *State v. Nolan*, 513.
 State v. McCoy, 545. *State v. Hornsby*, 554. *State v. Kennedy*, 590. *State v. Moore*, 618.
 1806. June 7, s. 1. Trial of Slaves. *State v. George*, 535.
 ———— s. 7. Rape by Slave. *State v. Bill*, 527.
 ———— s. 16. Homicide of Slave. *State v. Moore*, 518.
 1814. February 22, s. 2. Malicious striking of Master, &c., by Slave. *State v. George*, 535.
 1815. ———— 6, s. 5. Oaths of Office. *State v. Kennedy*, 590.
 1816. March 7. Church of St. Louis of New Orleans. *Wardens of Church of St. Louis v. Blanc*, 51.
 ———— s. 2. Acquisition of Domicil. *Rist v. Hagan*, 106.
 1817. February 20. Voluntary Surrender. *West v. Creditors*, 123.
 ———— s. 28. ———— *Quimper v. Bierra*, 204.
 ———— s. 35. ———— *Keyes v. Shannon*, 172.
 1818. March 16, s. 1. Acquisition of Domicil. *Rist v. Hagan*, 106.
 ———— 19, s. 2. Horse-stealing. *State v. Nolan*, 513.
 ———— 20, ss. 1, 2. Homicide. *State v. Moore*, 618.
 1819. ———— 3. Translation of Partidas. *Wardens of Church of St. Louis v. Blanc*, 51.
 1820. February 16. Translation of Partidas. *Ib.*
 1821. January 16, s. 3. Criminal Court of the First District. *State v. Kennedy*, 590.
 1822. March 22. Church of St. Louis of New Orleans. *Wardens of Church of St. Louis v. Blanc*, 51.
 1823. ———— 27, s. 2. Contempts of Court. *State v. Soule*, 500.
 1825. February 19, s. 1. Trial of Slaves. *State v. George*, 535.
 1826. March 29. Voluntary Surrender. *West v. Creditors*, 123.
 ———— April 7, s. 6. Attachments. *Irish v. Wright*, 428.
 ———— s. 9. Sequestration. *Fink v. Martin*, 256.
 1827. March 20. Branding of Animals. *State v. Charlot*, 529.
 1828. ———— 12. Repealing certain articles of Code of 1808. *Waggaman v. Zacharie*, 181.

1828. March 25, s. 25. Repealing Rules of Practice and Civil Laws in force before promulgation of Code of 1825 and Code of Practice. *Wardens of Church of St. Louis v. Blanc*, 51. *Waggonman v. Zacharie*, 181.
1829. February 7, s. 5. Assault with Dangerous Weapon, &c. *State v. Mir*, 549.
1831. March 25, s. 3. Injunction. *Brown v. Cougot*, 14. *De Lizardi v. Hardaway*, 20.
 ——— s. 1. Juries. *State v. Jones*, 616.
1833. ——— 29, s. 3. Injunction. *Brown v. Cougot*, 14.
1834. January 2, s. 3. Redhibitory Action. *Rist v. Hagan*, 106.
 ——— March 10. Titles of Purchaser at Judicial Sales. *Lamorandier v. Meyer*, 152.
1835. April 1, s. 4. Forfeited Bonds and Recognizances. *Second Municipality v. Labatut*, 33.
1836. March 2, s. 1. City Court of New Orleans. *Quimper v. Bierra*, 204.
 ——— 8. City of New Orleans. *Second Municipality v. Labatut*, 33.
 ——— s. 11. ———. *Second Municipality v. Botts*, 198.
1839. March 20, s. 6. Sequestration. *Fink v. Martin*, 256.
 ——— s. 13. Interrogatories to third persons under *fi. fa.* *Brode v. Firemen's Insurance Company*, 244.
1840. March 6. Juries. *State v. Jones*, 616.
 ——— s. 5. *State v. Nolan*, 513.
 ——— 20, s. 4. City of New Orleans. *Second Municipality v. Labatut*, 33.
 ——— s. 7. City of New Orleans. *Second Municipality v. Botts*, 198.
 ——— 28, s. 1. Abolishing *ca. sa.* *Ex parte Powell*, 95.
 ——— s. 5. Forced surrender. *Quimper v. Bierra*, 204.
1841. February 10, s. 14. Illegal conversion of money by public officers. *Ex parte Powell*, 95.
 ——— s. 16. Setting down causes for trial. *Hazard v. Boykin—Rehearing*, 254.
1842. February 16, s. 4. Church of St. Patrick of New Orleans. *City Bank v. McIntyre*, 467.
 ———, March 26. Lands divided into town lots. *City of Lafayette v. Parish Judge of Jefferson*, 5.
1843. March 22, s. 2. Appeals and notices of judgment. *Brode v. Firemen's Insurance Company*, 38.
 ——— 30. City of New Orleans. *Second Municipality v. Labatut*, 33.
 ———, April 5. Liquidation of banks. *United States v. Bank of United States*, 262.
 ——— 6. Court of Errors and Appeals in criminal matters. *State v. Jones*, 573.
 ——— s. 2. ———. *State v. Charlot*, 529. *State v. Adams*, 571.

1843, April 6, s. 5. Court of Errors and Appeals in criminal matters. *State v. George*, 535.

———— s. 7. Crimes committed by slaves. *Ib.*

1844, January 26. Juries in parish of Rapides. *State v. Jones*, 573.

III. Statute of Mississippi.

1840, February 21, s. 7. Transfer of evidences of debt by banks. *Hyde v. Planters Bank of Mississippi*, 416.

IV. Statutes of Pennsylvania.

1836, February . Charter of Bank of United States. *United States v. Bank of United States*, 262.

—, June 14. Assignees for benefit of creditors and other trustees. *Ib.*

1841, May 4. Assignments by Bank of United States. *Ib.*

———— 5. —————. *Ib.*

V. Statutes of England.

2 Henry IV., ch. 9. Jurors. *State v. Jones*, 616.

2 and 3 Edward VI., ch. 24. Venue in cases of murder. *State v. McCoy*, 545.

13 Elizabeth, ch. 5. Statute of frauds. *United States v. Bank of United States*, 262.

18 Elizabeth, ch. 7. Rape. *State v. Bill*, 527.

2 George II., ch. 21. Venue in cases of murder. *State v. McCoy*, 545.

STEAMER.

The second clerk of a steamer, may execute on behalf of the boat, a bill of lading in the ordinary way, and his receipt for merchandize delivered on board, will be binding; but to make a special contract—as to bind the boat for articles not delivered on board, his authority must be shown.

Kirkman v. Bowman, 246.

SUCCESSIONS.

1. A legacy, being indivisible as between the debtor and creditor, without the consent of both, a portion of it only cannot be seized and sold under execution. *Per Curiam*: The executors of the estate cannot, without their consent, be compelled to pay the legacy to a number of transferees, whether by voluntary assignment, or by legal transfers resulting from sales under execution. *Brown v. Cougot*, 14.

2. An executor is not a public officer within the meaning of the 14th sect. of the stat. of 10 February, 1841. The office of executor is a private trust. C. C. 2687, 2788. Since the stat. of 28 March, 1840, abolishing imprisonment for debt, a *ca. sa.* cannot be taken out on the return of a *fi. fa.* unsatisfied, against one who has converted to his own use money received by him as executor. *Ex parte Powell*, 95.

3. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages existing on it created by the deceased. The purchaser takes the property free of the encumbrances; and the Probate Court may order their erasure. But a District Court cannot in such a case, issue a *mandamus* to the recorder of mortgages directing him to erase the mortgages, where the mortgagees are not made parties to the proceeding. Such a proceeding would be unavailing, unless carried on contradictorily with the parties interested, and against whom it is intended to be used. *Leverich v. Prieur*, 97.
4. The proper time for the judge to order public notice to be given to the creditors to oppose, if they think fit, an administrator's account, is when he applies for an order to pay the debts of the estate. C. C. 1168, 1169, 1172. It is only when the administrator has funds in his hands, and has made a tableau of distribution, that the creditors can be lawfully called upon to establish their claims contradictorily with each other. But where, at the instance of the administrator, on his prayer for an order to sell the property of the estate, and on the exhibition of a list of its liabilities, the creditors have been notified to present their claims and to show cause why the account should not be homologated, a judgment rendered thereon in favor of a creditor, will be binding on the estate, though it will not preclude any opposition which other creditors may make to the claim when a regular tableau of distribution shall be filed. *Succession of Hart*, 121.
5. The capacity or incapacity of particular classes of persons to inherit, depends upon the legislative will. *Hyde v. Planters Bank*, 416.
6. Heirs represented by an attorney of absent heirs appointed by a court, are not heirs "*represented in the State*," within the meaning of art. 122 of the Code of Practice, which declares, that "all actions may be brought against vacant successions, when all the heirs are absent and not represented in the State, provided they be instituted against the curator." The representation which it contemplates is that of an agent, or curator duly appointed; and when the absent heirs are not so represented, a judgment rendered against the curator of the vacant succession, is as valid against the succession as if rendered against the heirs. C. P. 123. C. C. 1205.
Succession of Durnford, 488.
7. Where the curator of a succession claims in his account rendered to the Probate Court, an amount as damages for an eviction from land sold to him by the deceased, the allowance of which is opposed by the heirs, that court has jurisdiction of the questions whether there was a warranty and eviction, and as to the amount of the damage. A Probate Court may inquire into the title to real estate, when necessary to enforce its admitted jurisdiction. Nor will the fact of the right to damages being unliquidated, be any obstacle to their being claimed and allowed in compensation of any amount due by the curator to the succession. It is not necessary that the damages should have been previously liquidated in an action by the curator against the heirs. *Ib.*
8. Appellant, while acting as curator of a vacant succession, was evicted from

land purchased by him from the deceased, and in his account he credited himself with the amount claimed as damages for the eviction. On an opposition by the heirs, on the ground of prescription : *Held*, that until they appeared and claimed the succession the curator was its legal representative, and could not enforce a demand in his own favor, against it ; and that to the extent of the funds in his hands, his claim was compensated, and might be opposed to the claims of the heirs by way of exception, even if incapable of being enforced in a direct action. *Ib.*

SURETY.

1. Where property attached is released on the execution of bond with surety, and the debtor makes a surrender of his property before judgment, after which the action is cumulated with the insolvent proceedings, and a judgment for the claim is entered up with the consent of the syndic, the surety will be discharged. *Per Curiam* : Had no bond been given, the property attached would not have been subject to satisfy the judgment rendered against the syndic, but would have formed a part of the general fund from which all creditors were to be paid. The bond represents the property attached, so far as the attaching creditor is concerned. If, under the judgment against the syndic, the attaching creditor could have had no privilege on the property seized, he can have no right upon the bond, as the property represented by it has gone to the benefit of the mass of the creditors.

Keyes v. Shannon, 172.

2. One who has bound himself as surety for an officer of a bank in a bond, the condition of which recites that, the principal "shall well and truly perform and fulfil all the duties incumbent upon him by virtue of his office, or such other as may be assigned to him, or shall pay to the bank such damages or losses as it may incur by reason of the unfaithful performance of any of the said duties of said office," will be liable for any loss which the bank may sustain in consequence of any negligence of the principal, gross or slight, in the discharge of his official duties. The liability of the surety is not restricted to losses resulting from the unfaithfulness or dishonesty of the principal. C. C. 1924, 1925. *Union Bank v. Thompson*, 227.
3. The surety of an officer of a bank, sued by the bank for the amount of certain notes which plaintiffs alleged that they had been compelled to pay to the holders, in consequence of the neglect of the principal to have them protested at maturity as it was his official duty to do, whereby the endorsers were discharged, may show in reduction of damages, that the parties were liable notwithstanding the want of protest, or were insolvent when the notes matured. It was the duty of the bank, before paying the amount of the notes, to ascertain whether it was necessary to have had them protested. If the parties were insolvent at the time no loss can have been sustained from the want of protest, and the holders could not have recovered against the bank, nor can the surety be made liable to the latter for more than the injury really sustained by the holders of the notes. *Ib.*



TRIAL.

Defendant having pleaded his discharge as a bankrupt under the act of 1841, plaintiff impeached it, and defendant excepted to the impeachment for vagueness and insufficiency. On the trial of the exception the court sustained it, and thereupon gave judgment at once in favor of defendant upon the merits. *Held*: that the case not being before the court on its merits, but only on the exception, no judgment could be legally rendered but upon the latter leaving the case to be afterwards tried on the merits, when regularly set down; (C. P. 463, 533, 535. Stat. 10 February, 1841, s. 16;) that the main issue was, whether the certificate was a bar to the action; that plaintiff was entitled to a hearing thereon; and that the case should be remanded for that purpose. *Hazard v. Boykin—Rehearing*, 254.

See JURY, 1, 2. NEW TRIAL.

TWENTY-FIFTH OF DECEMBER.

Civil process may be served on the twenty-fifth of December. That day is not mentioned in art. 207 of the Code of Practice, among those on which no such process can be served. *Irish v. Wright*, 428.

VERDICT.

See CRIMINAL LAW, XIII. JURY.

WARRANTY.

See PLEADING, 5. SALE, 6, 9, 10, 11, 13, 15, 16, 17.

END OF VOLUME VIII.

ERRATA.

Page 95, line 3 from bottom, for 2687 substitute 2787.

207, last line,	" drawee	" payee.
208, line 2 from top,	" drawee	" payee.
210, " 12 " bottom,	" drawee	" payee.
228, " 2 " top,	" 1935	" 1925.
244, " 6 " top,	" their	" its.
428, " 15 " top,	" sixth	" seventh.
432, " 12 " bottom,	" 1836	" 1826.
500, " 19 " top,	" § 3	" § 2.
517, " 3 " top,	" second	" third.
522, " 19 " top,	" 246	" 260.
528, " 9 " top,	" 23 Jan'y	" 4 May.